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Implying Against Intent: A New Test for Congressional Intent Under Cort v. Ash

Michael Hirschkowitz

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Implying Against Intent: A New Test for Congressional Intent Under *Cort v. Ash*

Michael Hirschowitz[†]

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I. INTRODUCTION

What should the Supreme Court of the United States do when a plaintiff tries to sue a defendant under a federal statute that provides no private remedy for damages? This is the question at the heart of all cases dealing with so-called implied rights of action. This Comment addresses the topic of implied cause of action. The term “implied cause of action” does not have a clear meaning, but generally refers to a federal cause of action based on a federal statute¹ that does not expressly provide for a remedy.² When the Supreme Court implies a cause of action into a federal statute, the Court

¹ This Comment will not discuss in detail implication cases based on the Constitution. This is because the Supreme Court is generally more willing to find an implied cause of action under the Constitution than under a statute because constitutional implication tends to protect more fully constitutional rights than statutory implication can protect statutory rights. *See, e.g.*, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396-97 (1971) (holding an implied cause of action for violations of the Fourth Amendment); *Davis v. Passman*, 442 U.S. 228, 242-44 (1979) (holding an implied cause of action for violations of the Fifth Amendment); *Carlson v. Green*, 446 U.S. 14, 18-21 (1980) (holding an implied cause of action under the Eighth Amendment).

² This is a paraphrase of Justice Powell’s definition: “the right of a private party to seek judicial relief from injuries caused by another’s violation of a legal requirement. In the context of legislation enacted by Congress, the legal requirement involved is a statutory duty.” *Cannon v. Univ. of Chicago*, 441 U.S. 677, 730 n.1 (1979). This Comment makes use of both the terms “implied cause of action” and “implication” to mean this situation.

treats that action as if it were a literal provision of the statute.³ The question of jurisdiction to hear an implied cause of action case, however, is outside the scope of this Comment.⁴

The starting place is the leading Supreme Court case of *Cort v. Ash*,⁵ when the Supreme Court first defined a four-factor approach to implied causes of action. In doing so, it is important to know a brief history of implication. Each of the four factors will be discussed to understand what they mean. In addition, leading cases that changed this analysis will be analyzed. The four factors will then be examined as they currently stand in varying degrees of importance.

This Comment will next address two of the leading schools of interpretation on implication cases. One approach is that of Justice Scalia, who argues that the Court should rarely, if ever, use congressional intent in interpreting whether to imply a cause of action. On the other side of the issue are the contextualists who argue that even actual congressional intent is unnecessary if Supreme Court doctrines at the time of the creation of the statute often implied causes of action. Finding neither approach practical or acceptable, this Comment offers a third option: that the Supreme Court should imply causes of action only when Congress actually considered the

³ David L. Heinemann, Note, *Arbitrability of Claims Arising Under the Securities Exchange Act of 1934*, 1986 DUKE L.J. 548, 567-68 (1986). This also means that all defenses and requirements to reach federal court that the Court traditionally would grant under express causes of action also exist when the Court implies a private right of action. See *Pinter v. Dahl*, 486 U.S. 622, 639 (1988) (granting an *in pari delicto* defense for implied securities actions). See generally *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 821 (1988) (Stevens, J., concurring) (finding that the implied cause of action under federal patent law lacked merit and therefore the case did not “arise under” federal law).

⁴ Subject matter jurisdiction for an implied cause of action is derivative of whether the cause of action is implied. If the court does imply a cause of action, then there necessarily is federal question subject matter jurisdiction. If the court does not imply a cause of action, then there is no federal question subject matter jurisdiction based on the statute. 16B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 4004.3 (2d ed. 1987). There is some controversy, however, over the constitutional appropriateness of this kind of bootstrapping of subject matter jurisdiction. See, e.g., Michael J. Kaufman, *Mending the Weathered Jurisdictional Fences in the Supreme Court's Securities Fraud Decisions*, 49 SMU L. REV. 159, 193-99 (1996) (“When a federal court creates a private right of action for the violation of a federal statute, it engages in an unconstitutional expansion of its limited subject-matter jurisdiction.”); John T. Cross, *The Constitutional Federal Question in the Lower Courts of the United States and Canada*, 17 HASTINGS INT’L & COMP. L. REV. 143, 156 (1993) (arguing that “implying a cause of action from a statute undoubtedly involves a certain degree of judicial activism” and that “federal courts in the United States . . . regularly take this analysis”). Part of the concern over this dichotomy is that many enterprising litigants may attempt to argue for an implied cause of action from a statute which addresses jurisdictional concerns. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2754 (2004).

Additionally, the exercise of personal jurisdiction based on implied causes of action appears to extend just as far, and no further, than an expressed statutory right. *Omni Capital Int’l v. Rudolf Wolff & Co.*, 484 U.S. 97, 108 (1987).

⁵ *Cort v. Ash*, 422 U.S. 66, 78 (1975).

issue when creating the statute. As additional support for the direction of the Court towards implied causes of action, an appendix is provided.⁶

II. *CORT V. ASH* AND THE FIRST IMPLICATION CASES

The Supreme Court's approach to implied causes of action did not itself begin with the signal case of *Cort v. Ash*.⁷ Rather, that important decision synthesized several different approaches to implied causes of action and created a singular test. Due to this, the landmark case of *Cort* is a focal point of this Comment. What remained to be decided after *Cort* was not how to imply causes of action, but what controlled in that determination.

A. The *Cort* Decision

Cort involved the Bethlehem Steel Corporation allegedly violating a criminal statute,⁸ which barred a corporation from using general corporate funds to pay for political advertisements during the presidential campaign of 1972.⁹ The Court wasted little time, however,¹⁰ on the question of whether a criminal statute could result in civil remedies¹⁰ and remained fixed on the more memorable question of whether a statute that did not explicitly create a cause of action could create one implicitly.¹¹

A unanimous Court established a four-factor test based on old case law to determine whether a private suit could be found under the statute:¹²

First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legisla-

⁶ See appendix, *infra*. For easier reference, the appendix of cases is listed in reverse chronological order. For purposes of simplification, concurring Justices who join the majority opinion are placed under the heading of "majority" with a star by their name. This list consists of a brief and recent history of implication cases since 1979.

The appendix is meant to be a list of cases since 1979 where the Supreme Court has addressed the issue of whether a statute included an implied cause of action and is not meant to be an exhaustive list of all cases involving implication in other respects. Hence, cases where the Court has extended implied causes of action will be addressed in this Comment, but will not be listed in the appendix. *E.g.* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994); Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991). As the appendix shows, the cases have shown a clear trend towards less implication over the years.

⁷ *Cort*, 422 U.S. at 78.

⁸ 18 U.S.C. § 610 (1970).

⁹ *Cort*, 422 U.S. at 70.

¹⁰ *Id.* at 79 (holding that "provision of a criminal penalty does not necessarily preclude implication of a private cause of action for damages").

¹¹ *Id.* at 68 (noting that "the principal issue presented for decision is whether a private cause of action for damages against corporate directors is to be implied . . .").

¹² *Id.* at 78.

tive scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?¹³

Going systematically, the Court noted that the plaintiff failed to meet any of the factors. In examining the statute for rights, the Supreme Court found that “there was nothing more than a bare criminal statute, with absolutely no indication that civil enforcement of any kind was available to anyone.”¹⁴ Second, the Court pointed out that legislative history of Congress in this case “demonstrated that the protection of ordinary stockholders was at best a secondary concern.”¹⁵ The Court similarly found that the purposes of the statute would not be served because “the remedy sought would not aid the primary congressional goal” of preventing corporate influence in politics.¹⁶ Finally, the Court pointed out that state law already well regulated the issue in question and that several potential causes of action and remedies existed there.¹⁷ The Supreme Court therefore found that when the factors were added together in this case, the statute did not lend itself to an implied cause of action.

B. The Origins of *Cort*

The phenomenon of the Court implying a cause of action has a long history.¹⁸ Most scholars¹⁹ point out that the first case where the Court engaged in an implication analysis was in *Texas & Pacific Railway v. Rigsby*²⁰ where the Court engaged in a form of negligence per se combined with a determination of whether the injured party was of a class protected by the

¹³ *Id.* (internal citations omitted).

¹⁴ *Cort*, 422 U.S. at 80.

¹⁵ *Id.* at 81. As if to reiterate the point more clearly, the Court later exclaimed “there is no indication whatever in the legislative history of § 610 which suggests a congressional intention to vest in corporate shareholders a federal right to damages for violation of § 610.” *Id.* at 82.

¹⁶ *Id.* at 84.

¹⁷ *Id.* (“In addition to the ultra vires action pressed here, the use of corporate funds in violation of federal law may, under the law of some States, give rise to a cause of action for breach of fiduciary duty.”) (internal footnotes omitted).

¹⁸ Some argue that the Court had been implying causes of action from as far back as 1803, but had been doing so under a rationale different from *Cort*. Susan Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Rights of Action*, 71 NOTRE DAME L. REV. 861, 864 (1996); see also Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 68 (2001) (arguing that courts until the 1970s always implied causes of action to remedy violations of a statutory right).

¹⁹ E.g., Lisa E. Key, *Private Enforcement of Federal Funding Conditions Under §1983: The Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. DAVIS L. REV. 283, 291(1996); Bruce A. Boyer, Note, *Howard v. Pierce: Implied Causes of Action and the Ongoing Vitality of Cort v. Ash*, 80 NW. U. L. REV. 722, 733 (1985); Christopher L. Sagers, Note, *An Implied Cause of Action Under the Real Estate Settlement Procedures Act*, 95 MICH. L. REV. 1381, 1386 (1997).

²⁰ *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916).

statute.²¹ This approach was highly similar to that of a state court employing general common law principles.²² It therefore came as little surprise that the Court's pre-*Cort* presumption was to imply causes of action. This became problematic when the Court began to do away with the idea of a general federal common law.²³ While the presumption in favor of implication could no longer remain tethered to theories of negligence per se, the Court would not adjust this presumption until *Cort*.²⁴

This beginning led the Court to avoid engaging in this issue until 1964 in *J. I. Case Co. v. Borak*.²⁵ The allegation in *Borak* was that the J. I. Case Company, in attempting to merge with another corporation, violated their fiduciary duties to the shareholders and made misrepresentations when it sent out its proxy solicitations²⁶ to the shareholders.²⁷ The Court, by examining Section 14(a) in conjunction with Section 27 of the statute in question²⁸ thought it "clear that private parties have a right under Section 27 to bring suit for violation of Section 14(a) of the Act."²⁹ The Court added that the statute, by allowing for a suit "brought to enforce any liability or duty,"³⁰ created enough of an implication for the statute to contain an im-

²¹ *Id.* at 39 ("A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied."). Not all Supreme Court Justices have agreed that *Rigsby* began implied causes of action, however. See *Cannon*, 441 U.S. at 732 (Powell, J., dissenting) (commenting that *Rigsby* followed traditional common law approach to the issue "and cannot be taken as authority for the judicial creation of a cause of action not legislated by Congress").

²² *E.g.*, *Elder v. E. I. Due Pont de Nemours & Co.*, 479 So. 2d 1243, 1248 (Ala. 1985); *Crosby v. Hummell*, 63 P.3d 1022, 1025 (Alaska 2003); *Spates v. Dameron Hospital Assn.*, 114 Cal. App. 4th 208, 218 (Cal. Ct. App. 4th 2003).

²³ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979) (holding that the plaintiff's "argument in favor of implication of a private right of action based on tort principles, therefore, is entirely misplaced"). But see *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1110 (1991) (Scalia, J., concurring) (noting that "I recognize that the Court's disallowance . . . of an action for misrepresentation of belief is entirely contrary to the modern law of torts . . .").

²⁴ See generally *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (implying a cause of action based on different criteria).

²⁵ *Id.*

²⁶ A proxy solicitation is a solicitation sent out at the corporation's expense for the shareholders to vote on a matter deemed to be of corporate business. THOMAS LEE HAZEN & JERRY W. MARKHAM, CORPORATIONS AND OTHER BUSINESS ENTERPRISES, 576-707 (2003) [hereinafter HAZEN & MARKHAM]. Misrepresentation of proxy materials a violation of the Securities Act of 1933. 15 U.S.C.S. § 78n(a) (1934).

²⁷ *Borak*, 377 U.S. at 429-30.

²⁸ The pertinent text of Section 27 is as follows:

The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder 15 U.S.C. § 78aa (1934).

²⁹ *Borak*, 377 U.S. at 426-27.

³⁰ 15 U.S.C. § 78aa.

plied cause of action.³¹ The Supreme Court appeared to latch onto this “duty” creating language. The Court thus began the debate on whether duties amounted to rights under the later *Cort* analysis.

After *Borak*, the Court began to imply causes of action quite frequently.³² *Cort* therefore, became the seminal case not because it changed the law of implied causes of action, but because it delineated the four factors that the Court implicitly relied on in determining whether to imply a cause of action.³³ Notably, the Court, while establishing the test that arguably made implied causes of action far easier to find,³⁴ did not find one in this case.

C. The *Cort* Factors in Action

1. First Factor: Rights Conferred to the Plaintiff by Statute

The first factor of *Cort* is whether the plaintiff is part of an especial class who benefits from the statute and therefore creates a federal right. It is not simply enough that the word “right” is in the statute.³⁵ Additionally, the idea of an “especially harmed” class does not automatically confer a right.³⁶

³¹ *Borak*, 377 U.S. at 427.

³² See, e.g., *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972) (finding an implied cause of action under the Securities Act of 1934); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (finding an implied cause of action under the Voting Rights Act of 1965); *Rosado v. Wyman*, 397 U.S. 401 (1970) (finding an implied right of action in Social Security Act of 1935, as amended in 1967); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967) (finding an implied cause of action under the Rivers and Harbors Act of 1899); see also *Bivens*, 403 U.S. at 396-97 (finding an implied cause of action under the Fourth Amendment); Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 845 (2002) (“Between 1964 and 1975, the Supreme Court in several cases found an implied private cause of action under various regulatory statutes.”). But see *National R.R. Passenger Corp. v. National Ass’n. of R.R. Passengers*, 414 U.S. 453 (1974) (declining to find an implied cause of action after thorough examination of legislative intent).

³³ E.g., Charity Scott, *A Broker-Dealer’s Civil Liability to Investors for Fraud: An Implied Private Right of Action Under Section 15(C)(1) of the Securities Exchange Act of 1934*, 63 IND. L.J. 687, 701 (1988); Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665 (1987); Boyer, *supra* note 19, at 734. But see Key, *supra* note 19, at 295 (noting that commentators disagree as to whether *Cort* represented a departure from previous decisions); Michael A. Mazzuchi, Note, *Section 1983 and Implied Rights of Action: Rights, Remedies, and Realism*, 90 MICH. L. REV. 1062, 1074 (1992).

³⁴ See, e.g., Mank, *supra* note 32, at 845 (“Although the Supreme Court probably intended *Cort*’s four-part test to limit judicial implication of private rights of action, in the four years after *Cort*, twenty federal appellate decisions implied private actions from federal statutes.”).

³⁵ *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 18 (1981) (“In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”) (internal quotes omitted).

³⁶ *California v. Sierra Club*, 451 U.S. 287, 294 (1981) (“[S]uch a definition of ‘especial’ beneficiary makes this factor meaningless. Under this view, a victim of any crime would be deemed an especial beneficiary of the criminal statute’s proscription. *Cort* did not adopt such a broad-gauge approach.”).

To some extent, this became a threshold issue.³⁷ In fact, the Court, in *Cort v. Ash* itself noted specifically that the plaintiff had failed to meet this factor and therefore implication would likely be improper.³⁸ This factor was nothing new. The Supreme Court was merely relying on portions of doctrine already laid out in earlier decisions to support individuals whose statutory rights were injured.³⁹ In fact, this factor appears to be similar to state common law approaches to negligence per se.⁴⁰

Some have pointed out that this factor effectively asks whether Congress has bestowed specific substantive rights on an identifiable class of persons and whether supporting that right with a right to private suit is appropriate.⁴¹ Justice Stevens, for one, views this factor to be a paramount concern in the determination of whether a private cause of action exists.⁴² Some have argued that this factor, combined with the second factor, has been the Court's best effort to find the ultimate legislative intent.⁴³ The factor therefore changed from asking whether congressional intent existed to bestow a plaintiff some statutorily granted right, to whether the statute granted a right from which the Court could infer a congressional intent to imply a cause of action.⁴⁴

A prime example of this factor at work is that of securities fraud cases.⁴⁵ Indeed, entire sections of casebooks have been devoted to the study

³⁷ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-84 (2002) (holding that "we must first determine whether Congress intended to create a federal right"); Harvey R. Boller, *Unlawful Treatment of the Handicapped by Federal Contractors and an Implied Private Cause of Action: Shall Silence Reign?*, 33 HASTINGS L.J. 1293, 1301 (1982).

³⁸ *Cort*, 422 U.S. at 79.

³⁹ See Sagers, *supra* note 19, at 1395 (complaining that the first factor "is merely a restatement of the *Rigsby* standard"). "In fact, for the first factor the Court directly cited *Rigsby*." *Cort*, 422 U.S. at 78 (citing *Rigsby*).

⁴⁰ For example, in *Elder v. E. I. Du Pont de Nemours & Co.*, the Alabama Supreme Court held that negligence per se requires inter alia that "the trial judge must determine as a matter of law that the statute was enacted to protect a class of persons which includes the litigant seeking to assert the [state] statute." 479 So. 2d at 1248 (1985). This is highly similar to the *Cort* factor of asking whether the federal statute is one that benefits [or protects] a special class of citizens, including the litigant. *Cort*, 422 U.S. at 79.

⁴¹ Boyer, *supra* note 19, at 732.

⁴² See *infra*, note 155 and accompanying text for a discussion of the value of rights analysis as Justice Stevens understands it.

⁴³ Stabile, *supra* note 18, at 867.

⁴⁴ Scott, *supra* note 33, at 706.

⁴⁵ *Cent. Bank*, 511 U.S. at 171 ("This case concerns the most familiar private cause of action: one we have found to be implied by § 10(b), the general antifraud provision of the [Securities and Exchange Act]."). Scott, *supra* note 33, at 707 ("The Supreme Court has repeatedly announced that '[d]efrauded investors are among the very individuals Congress sought to protect in the securities laws.'"). This, however, does not mean that implied causes of action exist only in the field of securities law. See *Universities Research Ass'n, Inc. v. Contu*, 450 U.S. 754 (1981) (examining the question of whether a right was conferred under the statute in determining whether a private right of action should be granted); see also appendix.

of implied causes of action within the area of securities laws.⁴⁶ When the Court sees language in the statute that seems to create private rights, the implication of a private right of action appears to be more probable.⁴⁷ When the Supreme Court examines the statute, however, and finds that the statute limits a wrong rather than creates a right, the Court will not generally imply a cause of action.⁴⁸ In addition, “the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms.”⁴⁹

Some have pointed out that the word “right” is one of the most ambiguous words in the field of law.⁵⁰ Some have argued that a right is the result of a duty created by a statute.⁵¹ However, a right must be more than that for purposes of implied causes of action. Instead, the language of the statute must show intent to confer an actual right on the prospective plaintiff.

2. Second Factor: Legislative Intent

The second factor of *Cort*—namely whether there is any indication of legislative intent, explicit or implicit, to create a remedy or to deny one—has been the subject of much controversy.⁵² The Supreme Court placed the understanding of this factor under *National Railroad Passenger Corp. v. National Association of Railroad Passengers*.⁵³ This inquiry speculates that if Congress had specifically legislated on whether a cause of action should exist on this very matter, it would have granted one explicitly (or possibly would have refused to do so).⁵⁴ The original *Cort* approach therefore meant

⁴⁶ HAZEN & MARKHAM, *supra* note 26, at 576-707.

⁴⁷ Boller, *supra* note 37, at 1303.

⁴⁸ *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (“Statutes that focus on the person regulated rather than the individuals protected create ‘no implication of an intent to confer rights on a particular class of persons.’”) (internal citations omitted); *see also Contu*, 450 U.S. at 771 (holding that “there would be far less reason to infer a private remedy in favor of individual persons where Congress, rather than drafting the legislation with an unmistakable focus on the benefited class, instead has framed the statute simply as a general prohibition or a command to a federal agency”) (internal quotes omitted); *see also Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 92 (1981) (holding that the statutes in question were directed against employers rather than creating rights for those employers).

⁴⁹ *Blessing v. Freestone*, 520 U.S. 329, 341 (1997).

⁵⁰ Charles Davant IV, *Sorcerer or Sorcerer’s Apprentice?: Federal Agencies and the Creation of Individual Rights*, 2003 WIS. L. REV. 613, 628 (2003) (quoting 4 Roscoe Pound, *Jurisprudence* § 118, at 56 (1959)).

⁵¹ Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

⁵² Before the Supreme Court gets to the question of congressional intent, however, it must first find that Congress had a legitimate source of power to legislate. *Pennhurst*, 451 U.S. at 15.

⁵³ *Cort*, 422 U.S. at 77 (citing *Nat’l R.R. Passenger*, 414 U.S. at 458-60).

⁵⁴ *Gebser v. Lago Vista*, 524 U.S. 274 (1998). Obviously, the question is not whether Congress would have legislated on the issue implicitly, since the entire inquiry of an implied cause of action presupposes that Congress may have legislated on the matter implicitly.

that an implied right of action could be found even in the absence of legislative intent to grant it.⁵⁵

This hypothetical inquiry itself admittedly does change some common law presumptions in favor of implication, since the presumption must now be that there is no implied cause of action unless the legislative intent helps to establish otherwise while the old common law presumption was that a cause of action existed unless Congress acted otherwise.⁵⁶

The question of legislative intent always begins with the language of the statute.⁵⁷ In most contested cases, however, the statute itself is silent. This is only logical, of course, for if the language were clear on the issue the case would not rest on an implication theory in the first place. If the language of the statute does not result in clear finding of whether a cause of action exists, the Court will examine the legislative record for other aspects to determine legislative intent.

The Supreme Court has commented that one way to find this legislative intent is to look at the statute contextually.⁵⁸ The Court will look at the condition of the federal law on the subject at the time of the statute's passage to see what Congress would expect to happen when a private party attempted to enforce the statute. Inside of this inquiry into legislative intent, the Court has noted alternative remedies available to the plaintiff as relevant to the question.⁵⁹ If the plaintiff has other alternatives, the Court will usually assume that Congress did not intend to add a private suit to them.⁶⁰

3. Third Factor: Consistent with the Legislative Scheme

The third factor, whether an implied cause of action is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff,"⁶¹ means that the Supreme Court will examine the purposes of the statute and the remedies offered by Congress to determine if granting private actions would support or hinder those purposes.⁶² The Court recently elaborated on this factor to point out that "[a] private remedy should

⁵⁵ Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1423 (2001) (arguing that although the *Cort* factors "included congressional intent, courts remained free in theory to recognize an implied right of action even in the absence of legislative intent to grant one").

⁵⁶ Scott, *supra* note 33, at 711; *see also* Clark, *supra* note 55, at 1424 ("The result of the Court's current approach 'has been to reverse the presumption of the earliest implication cases' . . .").

⁵⁷ *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11 (1979).

⁵⁸ *Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286 (1993).

⁵⁹ *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982).

⁶⁰ *Id.*

⁶¹ *Cort*, 422 U.S. at 78.

⁶² *Touche Ross*, 442 U.S. at 573 (resting in part on the fact that "[t]here is evidence to support the view that [the statute] was intended to provide the exclusive remedy . . ."). *See generally Borak*, 377 U.S. at 431 (holding that the purpose of the statute in question led to the view that "broad remedial purposes" were to be included).

not be implied if it would frustrate the underlying purpose of the legislative scheme. On the other hand, when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute.”⁶³

One commentator views this factor as a policy determination by the Court to determine whether providing a private remedy would be fair under the statute.⁶⁴ This would appear to make this issue a hybrid between general policy determinations (which would encompass principles of common law jurisprudence) and a pure examination of congressional intent.⁶⁵ As such, the Court’s determination of purpose appears to begin and end at an analysis of remedies provided by the statute.⁶⁶

4. Fourth Factor: State Law

The fourth factor of *Cort v. Ash* is whether the cause of action is one traditionally relegated to state law that is the concern of the states, so that it would be inappropriate to infer a cause of action based on implication of a federal statute.⁶⁷ This factor has obliged the Court to keep a wary eye towards concerns for federalism.⁶⁸ This comes from an assumption made by the Supreme Court that Congress is familiar with the background of settled law when it considers a statute and that Congress would not enact a law that would violate fundamental principles of federalism.⁶⁹

This approach may be necessary from a policy perspective since a prospective plaintiff suing under a theory of an implied cause of action is suing under that theory to get into federal court rather than under a state claim. However, many times when there is a federal statute violation, there are

⁶³ *Cannon*, 411 U.S. at 703 (footnote omitted); see also *Contu*, 450 U.S. at 782-84 (holding that “the underlying purpose of the legislative scheme indicates that Congress did not intend to create the right of action asserted by respondent”); *Pennhurst*, 451 U.S. at 11 (noting the congressional purpose of the statute as one to “‘assist’ and financially ‘support’ various activities . . .” in ultimately determining that the statute does not contain a private right of action).

⁶⁴ Stabile, *supra* note 18, at 868.

⁶⁵ *Contus*, 450 U.S. at 777 (holding that the legislative intent behind the amended statute meant that “[t]o imply a private right of action here would be to defeat each of these congressional objectives”).

⁶⁶ E.g., *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 539-41 (1984) (holding that the purposes of the statute were to have the Securities and Exchange Commission address advisor’s fees rather than allow for investment companies to litigate privately). This provision of remedies, however, might be analyzed under either the second factor (by finding that the specification of some remedies precludes all others) or the first factor (as an examination that remedies provided in the statute specify who has the rights needed to be protected).

⁶⁷ *Cort*, 422 U.S. at 78; see also *Pennhurst*, 451 U.S. at 30-31 (holding that the statute in question did not constitute an area traditionally relegated to state law and therefore denial of the cause of action based on this factor was inappropriate).

⁶⁸ Stabile, *supra* note 18, at 868.

⁶⁹ See generally *Cannon*, 441 U.S. at 696 (“It is always appropriate to assume that our elected representatives, like other citizens, know the law . . .”).

concurrent state statutes that also hold a potential claim.⁷⁰ Part of this factor's purpose aims towards the idea that it is better policy to encourage plaintiffs to take their possible federal grievance up through alternative means.⁷¹ This is in keeping with other Supreme Court doctrines to avoid issues that may implicate constitutional problems wherever possible.⁷²

The Court in *Cort* cited *Borak* for this factor,⁷³ a case where the issue was regulated both by federal as well as state securities laws.⁷⁴ This does not mean that this factor is limited to those situations where a national interest exists. Instead, this factor may be utilized effectively when the cause of action would make as much sense in federal court as in state courts.

D. *Cort* and Later Case Modifications

The *Cort* holding and the four factors garnered unanimous support among the members of the Court at the creation of this test.⁷⁵ In later cases, when the Court began to use the *Cort* factors to imply causes of action, however, the Justices divided⁷⁶ and the Court began to adjust the test itself. Commentators have argued that the discord among the Justices has not been about whether to use the *Cort* factors, but how much weight to place on each particular factor.⁷⁷ Indeed, the varying weight that individual justices appear to place on each factor helps to explain Court decisions that appear to have adjusted the traditional *Cort* analysis.⁷⁸ A modern trend appears to form showing that cases post-*Cort* place a greater emphasis on legislative intent than any other factor.⁷⁹

⁷⁰ HAZEN & MARKHAM, *supra* note 26.

⁷¹ See *Daily*, 464 U.S. at 541 (holding that while a federal statute did exist to help regulate abuses against a corporation, "a corporation's rights against its directors or third parties with whom it has contracted are generally governed by state, not federal, law").

⁷² E.g., *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (noting that "it is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case") (internal citations omitted).

⁷³ *Cort*, 422 U.S. at 78.

⁷⁴ *Borak*, 377 U.S. at 434.

⁷⁵ *Cort*, 422 U.S. at 66.

⁷⁶ Boyer, *supra* note 19, at 735. Some Justices had also begun to complain about the extension of the implication doctrine. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975) (complaining that extension of the implication doctrine creates "a judicial oak which has grown from little more than a legislative acorn").

⁷⁷ See *Touche Ross*, 442 U.S. at 571 (majority finding the inquiry to end at the question of legislative history; concurrence finding that the inquiry ends after an examination of rights and legislative history; dissent demanding an examination of all four factors); Boyer, *supra* note 19, at 734 ("Dissension has arisen not over the elaboration of a standard for measuring congressional intent, but rather over its application and the weight to be accorded to the various factors described in *Cort*.").

⁷⁸ Scott, *supra* note 33, at 702.

⁷⁹ Peter J. Skalaban, Jr., *Borak Breathes: Implying A Private Right of Action to Enforce SEC Rule 14-A-8*, 61 GEO. WASH. L. REV. 1514, 1522 (1993).

1. The *Cannon* Adjustment

The first case to make a significant revision in the Court's analysis of *Cort* was *Cannon v. University of Chicago*.⁸⁰ In that case, the Court used all four factors in a thorough and methodical search⁸¹ to determine that a cause of action existed under Section 901 of Title IX of the Education Amendments of 1972.⁸² In so implying a cause of action, the Court looked at the second factor and looked at it with a decidedly expansive view of legislative intent. The fact that the act was similar to other statutes passed at the same time⁸³ and that Congress passed this statute in light of how lower courts were interpreting related language⁸⁴ weighed heavily in the Supreme Court's decision.

Especially notable about *Cannon* is that the Court hinted that its examination of each factor weighed towards finding congressional intent to create a cause of action even after engaging in a detailed examination of each factor.⁸⁵ Additionally, the *Cannon* Court pointed out that it would at times "take into account [the] contemporary legal context" of the time that the statute was passed to determine if there was an implied cause of action.⁸⁶ Admittedly, it is unclear as to whether *Cannon* itself represented a broad or narrow approach to the use of context,⁸⁷ but it appears certain that the Court, after *Cannon*, appeared to take *Cort*'s four factors and treat them in a weighted fashion.

Another major effect of *Cannon* was the resulting dissent by Justice Powell. Others concurred and dissented from the Court opinion, but no other side opinion has had as much of a lasting impression on implication jurisprudence.⁸⁸ While isolated in his dissent,⁸⁹ it seems apparent that Justice Powell's concerns and his proffered approach of using legislative intent as the most important factor in discerning implied causes of action was destined to become dominant among the Justices.

⁸⁰ *Cannon*, 441 U.S. 677.

⁸¹ Boyer, *supra* note 19, at 735 (stating that Justice Steven's *Cort* approach was "methodical").

⁸² *Cannon*, 441 U.S. at 680.

⁸³ *Id.* at 694.

⁸⁴ *Id.* at 696-98.

⁸⁵ *Id.* at 688 (noting that "before concluding that Congress intended to make a remedy available to a special class of litigants, a court must carefully analyze the four factors that *Cort* identifies as indicative of such an intent"); see also Stabile, *supra* note 18, at 868 ("Although the Court analyzed each of the four *Cort* factors, it expressly viewed the four factors as the means through which congressional intent could be discerned.").

⁸⁶ *Cannon*, 441 U.S. at 696-99.

⁸⁷ Mank, *supra* note 32, at 848.

⁸⁸ See, e.g., Key, *supra* note 19, at 297 ("Reasons for the Court's change in policy concerning implied causes of action can be gleaned from Justice Powell's dissenting opinion in *Cannon v. Univ. of Chicago*."); Boyer, *supra* note 19, at 736 ("With Justice Powell's dissent in *Cannon*, the battle lines on the application of *Cort* were clearly drawn.").

⁸⁹ *Cannon*, 441 U.S. at 731 (Powell, J., dissenting).

2. *Touche Ross* and Congressional Intent

The second case that meaningfully altered the *Cort* analysis was *Touche Ross & Co. v. Redington* where the Court refused to imply a cause of action in Section 17(a) of the Securities Exchange Act of 1934.⁹⁰ In this case, the Court recast the *Cort* factors into a grand general inquiry into legislative intent. The first major change that the *Touche Ross* Court brought to the *Cort* analysis was to hold explicitly that the four factors were not entitled to equal weight.⁹¹ Additionally, the Court pointed out what commentators had begun to see all too clearly,⁹² namely that several of the *Cort* factors were better understood as being additional ways to discern legislative intent and not necessarily separate inquiries for their own sake.⁹³ The *Touche Ross* Court therefore attempted to make this fact perfectly clear by pointing out that implied causes of action cases amounted to exercises in “statutory construction.”⁹⁴

Some have pointed out that while the *Touche Ross* Court did emphasize the second factor of legislative history as the most important and controlling factor, the Court did not completely remove from analysis the other three factors. Additionally, critics argue that some semblance of the other three factors must still be present under *Touche Ross* if the Court is to find legislative intent necessary to warrant implication.⁹⁵ For example, one

⁹⁰ *Touche Ross*, 442 U.S. at 576.

⁹¹ *Id.* at 575.

⁹² E.g., Thomas A. Lambert, *The Case Against Private Disparate Impact Suits*, 34 GA. L. REV. 1155, 1230 (2000) (“Subsequent Supreme Court decisions further confirmed that the *Cort* factors are relevant only insofar as they serve as proxies for legislative intent.”); Stabile, *supra* note 18, at 869 (“In the wake of *Cannon*, *Transamerica*, and *Touche Ross*, the Supreme Court has either ignored the *Cort* factors altogether, or used them only as evidence of congressional intent.”); Skalaban, *supra* note 79, at 1526 (“The Court refused to explore the third *Cort* factor—whether an implied right is necessary to effectuate the purpose of the section—on the basis of a sweeping statement that effectively reformulated the four-step *Cort* test”); Boyer, *supra* note 19, at 727 (arguing that “an examination of the case law surrounding *Cort* demonstrates that the Supreme Court’s mandate, indecisive at best, leaves room for a variety of factors to serve as interpretive tools”); Scott, *supra* note 33, at 706 (noting that “congressional intent [would] later . . . become the crucible of implication cases”); Paul E. Harner, Note, *Implied Private Rights of Action Under the United States Housing Act of 1937*, 1987 DUKE L.J. 915, 920 (1987) (“The Supreme Court’s strong emphasis on legislative intent also appeared in subsequent implied right of action cases.”); Mazzuchi, *supra* note 33, at 1076 (“In a series of statutory implied right of action cases after *Cort*, the congressional intent branch of the *Cort* inquiry increasingly displaced the competing notion that rights could be enforced without specific congressional intent.”); Steven M. Schuetze, Note, *Thompson v. Thompson: The Jurisdictional Dilemma of Child Custody Cases Under the Parental Kidnapping Prevention Act*, 16 PEPP. L. REV. 409, 422 (1989) (noting that “the four factors have been interpreted as merely relevant in determining whether a private remedy should be implied”).

⁹³ *Touche Ross*, 442 U.S. at 575-76 (noting that “the first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose, are ones traditionally relied upon in determining legislative intent”).

⁹⁴ *Id.* at 568; *see also Northwest*, 451 U.S. at 91 (holding that the Court’s “task is one of statutory construction”).

⁹⁵ Boyer, *supra* note 19, at 738.

commentator has pointed out that the first factor remains significant because of the growing importance of the second factor.⁹⁶

The Court, on occasion, has appeared to lean on a presumption that when some remedy is granted in the statute, legislative intent will not be found to support the implied cause of action because “when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly.”⁹⁷ To be sure, this is a view that appears more strongly held among specific Justices⁹⁸ rather than among the Court generally.⁹⁹ This position, however, is not without historical roots.¹⁰⁰

3. *Transamerica* and the Break Up of the First Two Factors

The third case to revise the *Cort* analysis was *Transamerica Mortgage Advisors, Inc. v. Lewis*.¹⁰¹ In that case, the Supreme Court held that the Investment Advisers Act of 1940 did not have an implied cause of action based on violation of the Act’s anti-fraud provision.¹⁰² The Court accepted that Congress intended to create a class of people entitled to certain rights under the Act.¹⁰³ Nevertheless, the Court refused implication based on the distinction that legislative history supporting a cause of action and legislative intent to create a class of individuals were two different inquiries.¹⁰⁴ In addition to this, the Supreme Court began a movement away from its view

⁹⁶ *Id.* (noting that “[the Court’s] conclusion was based largely on a finding under the first factor that the statutory scheme was designed only to facilitate supervision of brokerage activities by the Securities and Exchange Commission, not to benefit the plaintiff’s class”).

⁹⁷ *Touche Ross*, 442 U.S. at 572; *see also Cent. Bank*, 511 U.S. at 176 (“Congress knew how to impose aiding and abetting liability when it chose to do so But it did not.”).

⁹⁸ *E.g., Carlson*, 446 U.S. at 40 (Rehnquist, J., dissenting) (arguing that “it is obvious that when Congress has wished to authorize federal courts to grant damages relief, it has known how to do so and has done so expressly”); *Musick*, 508 U.S. at 291 (Kennedy, J.) (pointing out that “[the Court has] asked whether Congress ‘expressly or by clear implication’ envisioned a contribution right to accompany the substantive damages right created or, failing that, whether Congress ‘intended courts to have the power to alter or supplement the remedies enacted’”) (internal citations omitted).

⁹⁹ *Cent. Bank*, 511 U.S. at 192 (Stevens, J., dissenting) (complaining that “the main themes of the Court’s opinion [include] that . . . Congress knows how to legislate. [This] proposition[] [is] unexceptionable, but [is not a] reason to eliminate the private right of action against aiders and abettors of violations of § 10(b) and the Securities and Exchange Commission’s (SEC’s) Rule 10b-5.”).

¹⁰⁰ *See Porter v. Warner Holding Co.*, 328 U.S. 395, 405 (1946) (Rutledge, J., dissenting) (“Congress could not have been ignorant of the remedy of restitution. It knew how to give remedies it wished to confer. There was no need to add this one. Nor do I think it did so. It did not give it expressly. I do not think ‘other order’ in the context of [the statute] includes it.”); *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 204 (1962) (Black, J.) (“If Congress had intended that s 301 [sic] suits should also not be subject to the anti-injunction provisions of the Norris-LaGuardia Act, it certainly seems likely that it would have made its intent known in this same express manner.”); *Transamerica*, 444 U.S. at 19 (Stewart, J.) (holding that “it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it”).

¹⁰¹ *Transamerica*, 444 U.S. 11.

¹⁰² *Id.*

¹⁰³ *Id.* at 18-19.

¹⁰⁴ *Id.*

that finding a protected or designated class of citizens was one of the most accurate determinations¹⁰⁵ and the analytical adjustment here could be greater than the Court itself appeared to admit. The Court consequently continued its primary focus on congressional intent while attempting to separate the factors further from any possible confusion amongst each other.¹⁰⁶ The Court also appeared to rest part of its rationale on the fact that the statute, by expressly providing for some remedies, displayed an implicit legislative intent to deny others.¹⁰⁷

Some have pointed out that the true novelty of *Transamerica* was the Court's separation of whether a right existed from whether a remedy existed.¹⁰⁸ Until that decision, the Court consistently seemed to hold that wherever it found a right, the other three factors would presumably fall into place in order to imply a cause of action.¹⁰⁹ *Transamerica's* value therefore may also lay in the modification to the traditional *Cort* test so that the inquiry into the second factor is restricted to indications of congressional intent in the statute and accompanying legislative history rather than general examinations of congressional intent.¹¹⁰

4. *Thompson* and the Changing Intent Standard

The fourth case where the *Cort* analysis appeared to break down was *Thompson v. Thompson*.¹¹¹ The Supreme Court in this case ensured that the four *Cort* factors would receive varying weight by failing to explain each of the four factors specifically and instead resting almost exclusively on the question of congressional intent.¹¹² Although a unanimous Court refused to imply a cause of action under the Parental Kidnapping Prevention Act,¹¹³ the Justices nevertheless divided on how to go about inferring congressional intent between the majority's understanding and that of Justice Scalia. The Court as well as the concurrences appeared to agree with the view that the "focal point is Congress's intent in enacting the statute"¹¹⁴ and that the four

¹⁰⁵ *Cannon*, 441 U.S. at 690-91 n.13 ("Not surprisingly, the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action.").

¹⁰⁶ *Transamerica*, 444 U.S. at 15.

¹⁰⁷ *Id.* at 19.

¹⁰⁸ Boyer, *supra* note 19, at 739.

¹⁰⁹ See, e.g., *Cort*, 422 U.S. at 80 (finding no benefited class and equally finding no implied cause of action); *Cannon*, 441 U.S. at 693 (pointing out that "[u]nquestionably, . . . the first of the four factors identified in *Cort* favors the implication of a private cause of action" and equally finding an implied cause of action); *Touche Ross*, 442 U.S. at 575 (failing to find a benefited class and equally failing to find an implied cause of action).

¹¹⁰ Boyer, *supra* note 19, at 740.

¹¹¹ *Thompson v. Thompson*, 484 U.S. 174 (1988).

¹¹² Schuetze, *supra* note 92, at 422.

¹¹³ *Thompson*, 484 U.S. at 179.

¹¹⁴ *Id.* at 179.

factors of *Cort* have been used “as guides to discerning that intent.”¹¹⁵ However, the majority and the concurring members of the Court soon parted ways when the majority explained its understanding of congressional intent by explaining that “our focus on congressional intent does not mean that we require evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action.”¹¹⁶

Some have argued that these four cases taken together have effectively overruled *Cort v. Ash*¹¹⁷ despite the fact that the Supreme Court has never officially announced such a ruling. Notably, some of those who argue that *Cort v. Ash* has been overruled still are receptive to use the case in some, albeit limited, circumstances.¹¹⁸ Thus, some scholars remain adamant that *Cort* is no longer “good law”¹¹⁹ while others have accepted the continued use of the *Cort* analysis and have instead argued that these and other cases merely help to mold the factors into a more refined analysis.¹²⁰

E. The New, Improved *Cort* Test

The Supreme Court appears content with a new and updated form of the *Cort* analysis. This approach has remained a mixture of the subjective and objective factors mentioned in *Cort*.¹²¹ The most important factor appears to be congressional intent as understood through legislative history. This does not mean that the search for especial classes given rights under the statute no longer remains a factor to consider. Nor, for that matter, has the question of general legislative purpose disappeared from the scene. It

¹¹⁵ *Id.*

¹¹⁶ *Id.*; see also *id.* at 188 (Scalia, J., concurring) (“I am at a loss to imagine what congressional intent to create a private right of action might mean, if it does not mean that Congress had in mind the creation of a private right of action.”).

¹¹⁷ *Id.* at 189 (Scalia, J., concurring) (“It could not be plainer that we effectively overruled the *Cort v. Ash* analysis in *Touche Ross & Co. v. Redington* and *Transamerica Mortgage Advisors, Inc. v. Lewis*.”) (internal citations omitted). Justice O’Connor joined all parts of Scalia’s concurrence that include this rationale, but wrote separately to avoid joining Scalia’s entire rationale. *Thompson*, 484 U.S. at 188 (O’Connor, J., concurring).

¹¹⁸ *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 77 (1992) (Scalia, J., concurring) (pointing out that while implication cases have been less expansive, “causes of action that came into existence under the *ancient regime* should be limited by the same logic that gave them birth”).

¹¹⁹ *Lambert*, *supra* note 92, at 1231 (pointing out that “a number of lower courts have recognized this ‘effective overruling’ and have opined that the Court’s new emphasis exclusively on legislative intent results in a more stringent test for implied private rights of action”) (internal footnotes omitted); *Mazzuchi*, *supra* note 33, at 1078 (“While never overruled, *Cort* has become obsolete as the Court has focused on congressional intent to create judicial remedies.”); *Zeigler*, *supra* note 18, at 88 (“*Cort* became like a ghost attempting to regain solid form, appearing relatively substantial in one case only to fade to transparency in the next.”). Lower courts have not ignored the implications of this critique. See, e.g., *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1339 n.5 (11th Cir. 2002) (“Since the late 1970’s, the Court has gradually receded from reliance on three of these four factors, focusing more and more exclusively on legislative intent alone.”).

¹²⁰ *Harner*, *supra* note 92, at 923.

¹²¹ *Cross*, *supra* note 4, at 157.

does lend credence to the notion that abstract notions of federalism tend to carry little credible weight in implication cases though.

1. The Dominance of Congressional Intent

The recent understanding of the *Cort* test has placed the question of congressional intent as the paramount and controlling factor.¹²² Under this approach, the Court has generally denied a cause of action unless there is clear evidence that Congress intended it to exist,¹²³ usually not without a plain statement to that effect.¹²⁴ While at least one Justice cites judicial deference to Congress as the basis for this position,¹²⁵ for some reason that approach has never had the intellectual force to inspire debate among scholars. Other Justices have relied on congressional intent as understood by the existence (or nonexistence) of alternative remedial provisions.¹²⁶ Some have attempted to impress the idea that implication cases are a sub-category of general statutory construction¹²⁷ cases, but that rationale alone has not been terribly moving to the Court¹²⁸ or scholars.¹²⁹ Some scholars have argued for a theory of “rights equals remedies,” *i.e.*, that the entire source of the Court’s jurisdictional power to hear an implication case comes from general power of judicial review,¹³⁰ though the Supreme Court has

¹²² *E.g.*, *Touche Ross*, 442 U.S. at 568 (limiting the inquiry “solely to determining whether Congress intended to create the private right of action . . .”). *Thompson*, 484 U.S. at 179 (“The intent of Congress remains the ultimate issue, however, and ‘unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.’”); *Suter v. Artist*, 503 U.S. 347, 364 (1992) (“The most important inquiry here . . . is whether Congress intended to create the private remedy sought by the plaintiffs.”); *see also Va. Bankshares*, 501 U.S. at 1103 (noting that “the importance of enquiring specifically into intent to authorize a private cause of action became clear only later . . . in *Touche Ross*, [and only then] was this intent accorded primacy among the considerations that might be thought to bear on any decisions to recognize a private remedy”); *see also Cross*, *supra* note 4, at 157 (“Although [the Supreme Court’s] more recent decisions still apply the four-part test, any evidence of Congressional intent is virtually controlling.”).

¹²³ *See Va. Bankshares*, 501 U.S. at 1102 (“The rule that has emerged in the years since *Borak* and *Mills* came down is that recognition of any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a private remedy.”).

¹²⁴ Alexander Willscher, Comment, *The Justiciability of Municipal Preemption Challenges to State Law*, 67 U. CHI. L. REV. 243, 265 (2000).

¹²⁵ *Cannon*, 441 U.S. at 717 (Rehnquist, J., concurring).

¹²⁶ *Id.* at 724 (White, J., dissenting).

¹²⁷ As mentioned in note 92 *supra*, this idea is not entirely without precedent.

¹²⁸ *Northwest*, 451 U.S. 77 (stating that there is a distinction between statutory interpretation and implication: “the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt”).

¹²⁹ *Stabile*, *supra* note 18, at 878 (noting that the approach of statutory construction “does not provide a persuasive rationale”); *but see Skalaban*, *supra* note 79, at 1532 (“The implication inquiry is a matter of statutory construction.”).

¹³⁰ *Stabile*, *supra* note 18, at 882; *Mazzuchi*, *supra* note 33, at 1079-81; *Davant*, *supra* note 50, at 629-30. This argument posits that *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), itself was an implied cause of action case. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 742 (1989) (Brennan, J.,

declined this route.¹³¹ In a similar vein, others have argued that a narrow focus on congressional intent misses the point,¹³² though this argument appears to tilt at the Supreme Court windmills by longing for a return to a past view of implication that ignores current Court jurisprudence.¹³³

The last attempt to harmonize various Court efforts at inferring congressional intent was by Justice Marshall writing for the majority in *Thompson*.¹³⁴ While this helped to explain what the Court has looked at for inferring legislative intent,¹³⁵ it failed to provide a clear explanation of why the Court has focused almost exclusively on the subject.

a) *Justice Powell's Separation of Powers Approach.* Justice Powell may have articulated the best reason for implying a cause of action based on congressional intent in his previously noted side opinion of *Cannon*.¹³⁶ Justice Powell's argument rests on the view that when the Supreme Court starts to imply causes of action that were not expressly provided for by the statute, the Court violates basic separation of powers concerns because it implicitly takes upon itself jurisdiction of issues that have not necessarily been expressly granted by Congress.¹³⁷ This argument posits that if a rem-

dissenting) (citing *Marbury* as an implied cause of action case). This argument is unpersuasive since Marshall himself bifurcated the issue of rights and remedies pointing out that while a right may exist and a remedy may be needed to affect that right, the power of the court remains a critical issue in discerning whether that ultimate right can be remedied. See *Marbury*, 5 U.S. at 168 (where, after answering the question as to whether a right was granted to Marbury, the Court then examined whether the plaintiff was entitled to the remedy requested based (in part) on "the power of this court").

¹³¹ E.g., *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 595 (1983) ("Whether a litigant has a cause of action is 'analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive.'"); *Gonzaga Univ.*, 536 U.S. at 284 (holding that "a plaintiff suing under an implied right of action still must show that the statute manifests an intent to create not just a private right but also a private remedy") (internal quotations omitted).

¹³² Mazzuchi, *supra* note 33, at 1079 ("Requiring that Congress intend to allow parties to bring lawsuits to enforce their rights is like requiring that, in addition to intending to make a contract, parties to a contract also intend to allow themselves to be sued."). This argument appears to miss the additional nuance that in the paradigm contract case, only two parties exist: the offeror and the offeree, whereas in the paradigm implication case, at least three parties exist: the plaintiff, the defendant, and the Congress that passed the statute without explicitly determining if a cause of action existed.

¹³³ E.g., *Tex. Indust., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) ("Our focus, as it is in any case involving the implication of a right of action, is on the intent of Congress."); *Thompson*, 484 U.S. 174; *Daily*, 464 U.S. at 535-36 ("In evaluating such a claim, our focus must be on the intent of Congress when it enacted the statute in question."). But see *Va. Bankshares*, 501 U.S. at 1115 (Kennedy, J., dissenting in part and concurring in part) (expressing the view that the Court had declared "guerrilla warfare" against private rights of action under federal securities violations).

¹³⁴ *Thompson*, 484 U.S. at 177.

¹³⁵ *Id.* at 179.

¹³⁶ *Cannon*, 441 U.S. at 730 (Powell, J., dissenting); see also Key, *supra* note 19, at 297 (noting that "[r]easons for the Court's change in policy concerning implied causes of action can be gleaned from Justice Powell's dissenting opinion in *Cannon v. University of Chicago*").

¹³⁷ Stabile, *supra* note 18, at 879. At least some scholars have argued that Justice Powell's insistence on congressional intent implicates more than just separation of powers but also federalism concerns. E.g., Richard W. Creswell, *The Separation of Powers Implication of Implied Rights of Action*, 34

edy should exist for this matter, it should come from Congress after hearings, debate, and a legislative vote and not from judges, who are themselves not politically accountable.¹³⁸ Additionally, implying causes of action without requiring at least congressional intent to warrant implication runs the risk of contributing to legislative apathy. Worse still, Congress may become increasingly indifferent to its responsibilities on difficult matters that it should consider when passing new laws.¹³⁹ Other Justices on the Court have articulated this position.¹⁴⁰

Justice Powell's separation of powers argument rests on a presumption that Congress, rather than the Court should be the one to decide ultimately and finally the possibility of a cause of action under the statute. It naturally follows that if any *Cort* factor were to carry a controlling weight, it should be the factor most directly related to the views of Congress on the matter: legislative history and legislative intent.¹⁴¹ The problem of a four-factor test with each factor having equal weight is that some of the factors "too easily may be used to deflect inquiry away from the intent of Congress, and to permit a court instead to substitute its own views as to the desirability of private enforcement."¹⁴² For this reason, when the legislative history is clear, Justice Powell would follow the clear lead of Congress.¹⁴³

b) Powell's Critics. Some scholars have argued that this approach to separation of powers is a bit too simplistic.¹⁴⁴ They point out that separation

MERCER L. REV. 973, 1003 (1983) (explaining "the obvious advantages of congressional decisions over court decisions in safeguarding the federalist nature of our government are that Congress is politically responsible and that the states are actually represented in the Senate"); Clark, *supra* note 55, at 1423 (accord).

¹³⁸ *Cannon*, 441 U.S. at 731.

¹³⁹ *Id.* at 743 (Powell, J., dissenting) (noting that "[*Cort*] invites Congress to avoid resolution of the often controversial question whether a new regulatory statute should be enforced through private litigation").

¹⁴⁰ See, e.g., *Thompson*, 484 U.S. at 188-91 (Scalia, J., concurring) (arguing that implying causes of action too freely would abridge the role of Congress); see also *Bivens*, 403 U.S. at 411-12 (Burger, J., dissenting) (arguing that separation of powers concerns may limit a court's freedom to imply causes of action).

¹⁴¹ See *Cannon*, 441 U.S. at 731 (Powell, J., dissenting) ("Absent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action.").

¹⁴² *Id.* at 740.

¹⁴³ See Miguel A. Vaca, Comment, *Arbitrating Civil Rico and Implied Causes of Action Arising Under Section 10(b) of the Securities Exchange Act of 1934*, 36 CATH. U. L. REV. 455, 466 (1987) ("For Justice Powell, RICO's title and legislative history clearly prevented the statute from applying to 'garden variety fraud,' breach of contract cases, and 'innocent businessmen' whom Congress did not intend to reach with the statute.").

¹⁴⁴ Stabile, *supra* note 18, at 879 n.102 ("Justice Powell overstates the case. Judges may be immune from the political process, but they are not immune to political influences and predispositions."). Equally, one scholar has argued:

[t]he extreme position taken by Justice Powell is amplified by the observation that the twenty federal appellate decisions he cites as unconstitutionally implying private rights of action are not

of powers concerns are more nuanced and that the Supreme Court has held as much.¹⁴⁵ While this may be correct generally, it may neglect the point that the Court at times is satisfied enough with a “simplistic” understanding of constitutional doctrines when a more nuanced understanding would vitiate logic and the blueprint of the Constitution.¹⁴⁶

Scholars additionally argue that Powell’s approach is internally inconsistent with his deference for Congressional will.¹⁴⁷ They argue Powell’s refusal to imply a cause of action based on anything other than legislative intent is a false desire because Congress, if it believes that the Court has gone too far in implying the right into the statute, can always repeal that judicial interpretation by passing a clearer statute.¹⁴⁸ Hence, because the Court is engaged in statutory interpretation and therefore can be overruled by statutory amendment, a misinterpretation does not rise to the level of a separation of powers problem.¹⁴⁹

This argument is flawed in that it assumes that an action by the Court in an area that may violate constitutional issues should be permissible because they can be rectified by later Congressional action. In layman’s terms, it argues that two wrongs (Congressional inaction and an incorrect decision by the Supreme Court) can make a right because they can always be fixed

products of the liberal Warren Court era. Rather, a substantial number of judges who decided these cases were appointed by Presidents Nixon and Ford. To argue that these strict constructionist judges, as many of them undoubtedly may fairly be categorized, are engaging in judicial legislation is an overstatement. In essence, Justice Powell’s opinion suggests that he may be unfamiliar with the legislative process. He wants Congress to speak loudly and clearly whenever it seeks to effectuate a legislative objective. Although the implementation of this practice would be desirable, it is unrealistic. Legislation is often ambiguous, not because ambiguity is desirable, but because compromise, with the attendant loss of clarity, is required for passage of the legislation. Such a result may be unfortunate, but at least frequently in our system, it is the nature of the legislative process.

Marc I. Steinberg, *Implied Private Rights of Action Under Federal Law*, 55 NOTRE DAME LAW. 33, 40-41 (1979).

¹⁴⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (noting that the Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity”); see also Creswell, *supra* note 137, at 990-91; Stabile, *supra* note 18, at 879 (arguing that the Supreme Court has “long since abandoned a literal application of separation of powers, which would require a strict and absolute separation between the functions of the branches of the federal government”).

¹⁴⁶ See generally *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (denying Congress the ability of a single house veto because doing so would undermine the basic constitutional provisions of bicameralism and presentment); *Printz v. United States*, 521 U.S. 898 (1997) (denying Congress the power to command the states to act in furtherance of newly passed federal gun laws as it would be a violation of principles of federalism).

¹⁴⁷ See Boyer, *supra* note 19, at 749 (complaining that Justice Powell’s “fear is belied . . . by the fact that, given the remedial nature of the judicial role, elaboration of proper enforcement mechanisms by the courts reflects a sensible allocation of functions between the judiciary and legislature”) (internal quotes omitted).

¹⁴⁸ *Id.* at 749-50.

¹⁴⁹ *Id.*

later. Ironically, this claim as well as the scholarly response to Justice Powell's approach raises yet another constitution problem by asking Congress to decide who will be the final arbiter of the Constitutional issue of separation of powers in implied cause of action cases: the Supreme Court or Congress. Based on this inconsistency some scholars have gone so far as to make the claim that Justice Powell's focus on *Cort*'s second factor overruled *Marbury v. Madison*.¹⁵⁰

Recent cases tend to reflect that Powell's concerns resonate with the current Court.¹⁵¹ In fact, one could make the argument that current Justices' concern with the Supreme Court's *Cort* approach has not been that the analysis focuses on legislative intent. The concern has instead been that the inquiry into legislative intent has been so expansive that the legislative materials examined might not be terribly accurate indicators of Congress's actual intent.¹⁵² The post-*Cannon* Court still examines implications based ostensibly on all four factors;¹⁵³ however, it appears increasingly apparent that an affirmative (or negative) finding on the issue of legislative history as it leads to congressional intent will tend to decide the issue prematurely.¹⁵⁴

2. The Search for Rights Remains Important

This is not to imply that the first *Cort* factor is lacking all significance. In fact, this factor seems to remain important in determining many implication cases.¹⁵⁵ For example, in *Touche Ross*, the Supreme Court did stop the examination of each *Cort* factor before it could be determined whether they

¹⁵⁰ See *supra* note 130 for a discussion of *Marbury*.

¹⁵¹ See, e.g., *Wilder v. Va. Hosp. Assoc.*, 496 U.S. 498, 509 n.9 (1990) ("The [*Cort*] test reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes."); *Touche Ross*, 442 U.S. 560; *Thompson*, 484 U.S. 174; *Musick*, 508 U.S. at 291 (holding that Supreme Court precedents "teach that the creation of new rights ought to be left to legislatures, not courts"). Clark, *supra* note 55, at 1423 ("The Supreme Court's current approach to implied private rights of action [responds] to these concerns.").

¹⁵² See *Thompson*, 484 U.S. at 188 (Scalia, J., concurring) ("We have said, to be sure, that the existence of intent may be inferred from various indicia; but that is worlds apart from today's Delphic pronouncement that intent is required but need not really exist.").

¹⁵³ See Harner, *supra* note 92, at 920 (noting that "the Court has declined to adopt Justice Powell's suggested rejection of *Cort* in favor of exclusive reliance on express congressional intent"); Boyer, *supra* note 19, at 741 (arguing that at least as of 1985, "a majority of the Court, including Justices Stevens, Brennan, Marshall, White, and Blackmun, continues to espouse *Cort* as the proper framework for determining congressional intent"). This view may no longer be the case. As the appendix shows, since 1997, the majority of the Court has tilted against implications, implying a cause of action in just one case. In fact, a "head count" of the justices (counting concurrences as supportive of the majority) shows that for the last six years, at least four Justices—Rehnquist, Scalia, Thomas, and Kennedy—have consistently refused to imply a cause of action while O'Connor has tended to join that position in most cases.

¹⁵⁴ See *Touche Ross*, 442 U.S. at 576 (stopping the examination of the *Cort* factors after examining the first three factors).

¹⁵⁵ E.g., *Contu*, 450 U.S. at 771-72, ("The Court consistently has found that Congress intended to create a cause of action 'where the language of the statute explicitly [confers] a right directly on a class of persons that [includes] the plaintiff in the case.'").

supported implication.¹⁵⁶ Nevertheless, the Court appeared to weigh heavily the fact that the statute appeared to confer no right.¹⁵⁷ Though the Court did lessen the importance of the rights factor, it did not remove it entirely from the equation.¹⁵⁸ Even Justice Powell, the strongest proponent of elevating of the second factor above the other three, did not go so far as to excise the *Cort* analysis when given the chance.¹⁵⁹

Scholars have additionally pointed out that the first factor remains important “because the Court must consider the purpose of a cause of action in deciding whether Congress intended to create it.”¹⁶⁰ They argue that it is logically “almost impossible to answer the question of whether Congress intended to create a cause of action to enforce the right the plaintiff asserts without deciding whether the statute actually confers the right.”¹⁶¹ Others have pointed out, however, that either “the congressional intent or the rights element of *Cort* had to eventually predominate, because in mixing the two elements, *Cort* embraced a contradiction.”¹⁶²

Faced with this choice, it appears that Court did minimize the importance of rights in relation to congressional intent.¹⁶³ Recent cases suggest that this trend will continue.¹⁶⁴ This result may yet beg the question of whether the Court simply avoids decisions based on a rights analysis and instead categorizes the issue as one of congressional intent.

Even if the Court as a whole does not appear to engage in a rights analysis with the same gusto that it demonstrates towards legislative history and legislative intent, certainly individual Justices on the Court continue to do so. For example, Justice Stevens, writing for the majority in *Cannon*, argued that when “it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private

¹⁵⁶ *Touche Ross*, 442 U.S. at 575.

¹⁵⁷ *Id.* at 569.

¹⁵⁸ *Cannon*, 441 U.S. at 693 n.13. (noting that “the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action This Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case.”).

¹⁵⁹ *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Assoc.*, 453 U.S. 1, 4 (1981) (examining the statute under all four factors of the *Cort* test).

¹⁶⁰ Zeigler, *supra* note 18, at 110.

¹⁶¹ *Id.* at 111; *see also* Davant, *supra* note 50, at 635 (arguing that “if regulations do not create rights, then the regulations cannot be privately enforced”).

¹⁶² Mazzuchi, *supra* note 33, at 1078.

¹⁶³ *Transamerica*, 444 U.S. at 12 (denying plaintiff a private right of action for damages despite finding that the plaintiff was an intended beneficiary of the statute in question); *see also Contu*, 450 U.S. at 771 (holding that “the fact that an enactment is designed to benefit a particular class does not end the inquiry; instead, it must also be asked whether the language of the statute indicates that Congress intended that it be enforced through private litigation”).

¹⁶⁴ E.g., *Verizon Comm., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 878 (2004) (“That Congress created these duties, however, does not automatically lead to the conclusion that they can be enforced by means of a [cause of action].”).

cause of action, although an explicit purpose to deny such an action would be controlling.”¹⁶⁵ Some scholars have retorted, however, that a straightforward reading of this language is uncalled for because it would be “so broad that a seemingly endless number of statutes would appear to confer a federal right on one class or another in satisfaction of the first of the four *Cort* tests.”¹⁶⁶

Furthermore, the Court has held that implications do not require explicit grant of a right. Instead, the grant of some right to a class of citizens can be implicit in the language and structure of the statute.¹⁶⁷ This approach tends to run the risk that the Court may portray what it is doing as an examination of the second factor.¹⁶⁸

3. Statutory Purpose Is Not Yet Dead

In addition, the third factor is still in play, at least somewhat.¹⁶⁹ Some have pointed out that courts must consider the question of whether implication is “consistent with the underlying purposes of the legislative scheme to imply [a particular] remedy for the plaintiff”¹⁷⁰ because implication cases, by definition, do not expressly provide a cause of action.¹⁷¹ Scholars making this argument, based on extrapolations from Supreme Court precedent,¹⁷² admittedly argue this point too far.¹⁷³ Nevertheless, this contingent points out that unless the Court looks at the overall background statutory purpose, it denies itself the ability to answer whether Congress actually intended to imply a cause of action.¹⁷⁴

Regardless of the correctness of that position, the Supreme Court appears to have moved further away from this factor in later cases.¹⁷⁵ Thus,

¹⁶⁵ *Cannon*, 441 U.S. at 694 (quoting *Cort*, 422 U.S. at 82) (internal quotes omitted).

¹⁶⁶ *Boller*, *supra* note 37, at 1304.

¹⁶⁷ *Cannon*, 441 U.S. at 693.

¹⁶⁸ *Zeigler*, *supra* note 18, at 112.

¹⁶⁹ *Merrill Lynch*, 456 U.S. at 384-85 (holding that the creation of an implied cause of action would further the purpose because “Congress viewed private litigation against exchanges as a valuable component of the self-regulation concept”); *see also Gebser*, 524 U.S. at 284 (“To guide the analysis, we generally examine the relevant statute to ensure that we do not fashion the scope of an implied right in a manner at odds with the statutory structure and purpose.”).

¹⁷⁰ *Cort*, 422 U.S. at 78.

¹⁷¹ *Zeigler*, *supra* note 18, at 111.

¹⁷² *See Thompson*, 484 U.S. at 179 (noting that “the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question” of whether Congress actually had in mind creation of a private cause of action).

¹⁷³ *Zeigler*, *supra* note 18, at 111 (arguing that implication cases by definition involve silence both on the statute’s surface as well as in the immediate legislative history). This understanding is not necessarily true. It is entirely possible for the legislative history to be clear on the point while the statute is itself silent. Otherwise, there would be little need for the second factor of the *Cort* test itself.

¹⁷⁴ *Id.*

¹⁷⁵ *Sandoval*, 532 U.S. at 286-87 (“Without [congressional intent], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how com-

while cases that rested on this issue have never been overruled,¹⁷⁶ the Court has expressed the opinion that the current doctrine applies a “stricter standard.”¹⁷⁷ Some scholars have even gone so far as to call this factor “irrelevant” if the first two factors are missing.¹⁷⁸ This is especially enlightening when one notes that the question of congressional purpose was of some import at the time of *Cort*,¹⁷⁹ perhaps implying that the change by the Court in cases such as *Touche Ross* had more to do with the rising value of congressional intent rather than the decreasing value of statutory purpose.

Some have also pointed out that the search for congressional purpose is really a continuation of the search for rights, unless somehow interrupted by the second factor during the search through legislative materials.¹⁸⁰ Under this logic, if a right appears conferred by the statute, the Court should examine whether it would serve the legislative purpose to imply a cause of action and only refuse implication if the Court finds contrary legislative intent.¹⁸¹ This concept appears to be an attempt to take the *Cort* factors and turn them into a conjunctive test where implication can only occur if the Supreme Court finds a right plus a purpose and only if legislative intent is silent or supportive. This would change the original factorial approach that the original *Cort* Court and subsequent Court cases have analyzed implication.¹⁸² This approach thus may go too far, but it logically follows that a strict understanding of the third factor should rarely lend independent guidance as to whether a statute warrants implication.¹⁸³ Most would agree that the most successful way to further the purpose of protecting a class’s rights

patible with the statute.”). See, e.g., *Sierra Club*, 451 U.S. at 298 (holding that because the first two factors were not found, “it is unnecessary to inquire further to determine whether the purpose of the statute would be advanced by the judicial implication of a private action . . .”); *Texas Indus.*, 451 U.S. at 639 (holding that the absence of the first two factors “makes examination of other factors unnecessary”); see also *Thompson*, 484 U.S. at 183 (holding that no implied right of action exists because it would be contrary to “the purpose and context of legislative scheme to infer a private cause of action.”).

¹⁷⁶ See *infra* note 244 and accompanying text for a discussion of the differing beliefs of the Justices on whether *Cort* has been overruled.

¹⁷⁷ *Touche Ross*, 442 U.S. at 578.

¹⁷⁸ Skalaban, *supra* note 79, at 1532.

¹⁷⁹ See, e.g., *Thompson*, 484 U.S. at 177 (stating that “one of the chief purposes of the [statute in question] is to ‘avoid jurisdictional competition and conflict between State courts’ rather than to allow for a private right of action”); *Sec. Investor Corp. v. Barbour*, 421 U.S. 412, 421, 423 (1975) (“It is clear that the overall structure and purpose of the SIPC scheme are incompatible with such an implied right . . . Congress’s primary purpose in enacting the SIPA and creating the SIPC was, of course, the protection of investors. It does not follow, however, that an implied right of action by investors who deem themselves to be in need of the Act’s protection, is either necessary to or indeed capable of furthering that purpose.”).

¹⁸⁰ Scott, *supra* note 33, at 749.

¹⁸¹ *Id.*

¹⁸² See *Cort*, 422 U.S. at 78.

¹⁸³ See *Guardians*, 463 U.S. at 601 (holding that the purpose of the statutory scheme, seen through the congressional intent, required that administrative remedy be the sole remedy of the violation).

would be to allow private litigation under the statute.¹⁸⁴ Thus, if left without any other indication of legislative intent on the matter, it would appear that the most logical recourse for the Court to assume that Congress did implicitly allow for such private suits.¹⁸⁵

4. Federalism: The *Cort* Non-Factor

“The fourth factor focuses on whether to consider implication in light of whether the cause of action is a type traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on a federal statute.”¹⁸⁶ While useful as a factor during the early *Cort* years, this factor weakened in strength as corresponding concerns about federalism began to weaken.¹⁸⁷ To be sure, this factor remains present, if only to demark that Congress, presumably aware of the state of Constitutional law, would not pass a law that would violate federalism principles if it could. Even as concerns of federalism have returned to the forefront,¹⁸⁸ there has not yet been a concurrent revival of the state law factor in deciding implication cases.¹⁸⁹ There are even times when the Supreme Court has simply ignored this factor.¹⁹⁰ More strikingly,¹⁹¹ in some cases the Court refused even to reach this factor of the *Cort* test.¹⁹¹ The most that one can say about this factor today is that it neither hinders nor helps implication in any significant way.¹⁹²

¹⁸⁴ See *Borak*, 377 U.S. 426 (noting that civil litigation provided “a most effective weapon in the enforcement of the proxy requirements”); see also *Bateman, Eichler, Hill & Richards, Inc. v. Berner*, 472 U.S. 299, 315-19 (1985) (noting the value of private suits to enforce federal law as having maximum deterrence value).

¹⁸⁵ Scott, *supra* note 33, at 749-52.

¹⁸⁶ *Cort*, 422 U.S. at 78.

¹⁸⁷ That is not to say that concerns of federalism have eroded from the Court entirely, but merely that as the federal government began to engage in an increasing area of federal control, those areas considered traditionally regulated by the states have begun to dwindle.

¹⁸⁸ E.g., Clark, *supra* note 55 (arguing that separation of powers is merely a protection of federalism); Robert Knowles, Notes & Comments, *Starbucks and the New Federalism: The Court's Answer to Globalization*, 95 NW. U.L. REV. 735, 739 (2001) (pointing out that “the Court's most recent decisions make it clear that the comprehensive revival of federalism will continue”).

¹⁸⁹ Some have noted that the Court is beginning to swing towards a neo-classical understanding of federalism. Even if true, it has not led the Court to give greater credence to the fourth *Cort* factor as of this writing. See *Thompson*, 484 U.S. at 182-83.

¹⁹⁰ E.g., *Middlesex*, 453 U.S. at 13-18; *Texas Industries*, 451 U.S. at 639-40; *Transamerica*, 444 U.S. at 15-25.

¹⁹¹ E.g., *Cannon*, 441 U.S. at 708-09; *Sierra Club*, 451 U.S. at 298 (holding that since the first two factors were not found, “it is unnecessary to inquire further to determine . . . whether such a remedy is within the federal domain of interest”).

¹⁹² Scott, *supra* note 33, at 753. This factor may not be completely dead yet. In *Thompson*, the petitioner argued that implication would not violate jurisdictional concerns because the merits of the child custody case (a traditional state issue) itself would not be decided. The Supreme Court denied this argument based on the reasoning that if it found a private remedy, then a federal court could determine the case on the merits. *Thompson*, 484 U.S. at 187 n.4.

The basic problem with this factor is that most federal statutes for which plaintiffs seek implication involve inherently federal issues.¹⁹³ For example, while state securities laws do exist, they simply do not compare in range and effect as the Securities Exchange Acts of 1933 and 1934.¹⁹⁴ A survey of the last ten implied cause of action cases examined by the Court has revealed few issues where the state regulations, where they have regulated, are of the same significance and reach as its federal counterpart.¹⁹⁵ Indeed, many scholars appear to note this factor as a mere afterthought in respect to current Court analysis of *Cort*.¹⁹⁶

At least one scholar has attempted to revive this factor, however, urging that it should remain as a viable issue for the Court to consider.¹⁹⁷ In this understanding, concerns of federalism always remain a consideration while the corresponding issues of congressional intent remain weakened a bit.¹⁹⁸ This argument attempts to simplify the inquiry somewhat to ask if the plaintiff would be able to sue under any applicable and viable theory of state law. For instance, if a potential cause of action would violate a federal law as well as state tort law, “courts should be particularly deferential to state law and state remedies.”¹⁹⁹

III. IMPROVING THE CONGRESSIONAL INTENT FACTOR

If one accepts that implied causes of action now turn mainly on the determination of congressional intent, the inquiry must therefore focus on “how much” intent must exist before the action will lie. The Supreme Court has hinted but never quantified the amount of intent needed, but there are some clues about the quality of intent that needs to be in the legislative record. On this point, two extreme positions seem to have risen. The first is that of Justice Scalia, who has taken Justice Powell’s concerns towards implication generally and has argued for the Court to discard the congressional

¹⁹³ Even when the issue is not inherently federal, the Supreme Court has shown little compunction with interpreting the federal statute narrowly to avoid conflicting with the state law. See *Pennhurst*, 451 U.S. at 30-31 (holding that the statute in question did not constitute an area traditionally relegated to state law and therefore denial of the cause of action based on this factor was inappropriate).

¹⁹⁴ *Borak*, 377 U.S. at 426.

¹⁹⁵ See appendix.

¹⁹⁶ E.g., Lambert, *supra* note 92, at 1230 (pointing out that “the first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose . . . —are ones traditionally relied upon in determining legislative intent”); *id.* at 1232 (“A plaintiff may bring a private action, in the absence of express provision of such an action, only if he proves—from the legislative history, language or structure of the statute, or from the circumstances of the statute’s enactment—that Congress intended such private actions to be brought.”) (internal footnotes omitted); Scott, *supra* note 33, at 753 (noting that “the significance or effect of demonstrating the federal nature of the right, and thereby satisfying the fourth *Cort* factor, is questionable under recent cases, however.”).

¹⁹⁷ Stabile, *supra* note 18, at 907.

¹⁹⁸ *Id.* at 903-08.

¹⁹⁹ *Id.* at 906.

intent factor in favor of expressed intent, to be used only when the intent is unmistakable and clear.²⁰⁰ The second view has been that of scholars and (from time to time) some Justices who imply that actual congressional intent itself can be entirely neutral or even non-existent and yet other factors may still lend understanding as to what Congress would want the Court to do.²⁰¹ While the former argument seems to hold the stronger rationale, neither argument appears to be appealing pragmatically or theoretically for the Supreme Court. This Comment offers a third approach, namely asking the Court to require that some intent must be used in implication cases, but only when there is a sufficient objective indication in the legislative record that such intent, if found, would indicate clearly that the legislature intended a cause of action to be implied.

A. Scalia's Approach

Justice Scalia's view on implied causes of action is to some extent simply an extension of Justice Powell's earlier criticisms.²⁰² Both appear to view the problem in terms of judicial encroachment on the traditionally congressional areas of lawmaking.²⁰³ The difference, however, is one of degree. Justice Powell argued that using all four parts of the *Cort* test is incorrect because doing so fails to focus properly on the statute and the intent of the statute.²⁰⁴ Justice Scalia's approach responds that using any of the factors of *Cort* runs the risk of not being true to what the legislature enacted, regardless of their intent.²⁰⁵ Justice Scalia therefore appears to have developed a new corollary to Justice Powell's approach.²⁰⁶ For that reason that Justice Powell's initial concerns brought forth a relatively swift shift in

²⁰⁰ See Marc I. Steinberg & William A. Reece, *The Supreme Court, Implied Rights of Action, and Proxy Regulation*, 54 OHIO ST. L.J. 67, 82 n.112 (1993) (arguing that acceptance of congressional intent still would not satisfy Justice Scalia's approach).

²⁰¹ See *infra*, notes 275-85 and accompanying text on contextualism.

²⁰² Scott, *supra* note 33, at 714 n.115 (noting that Justice Scalia's approach towards implied causes of action are "along [the] line" of Justice Powell); see also Glen Shu, Comment, *Take a Second Look: Central Bank After the Private Securities Litigation Reform Act of 1995*, 33 HOUS. L. REV. 539, 576 n.198 (1996) (noting that Justice Powell has criticized implied causes of action and that "in particular, Justice Scalia has harshly criticized the Court's use of the implication doctrine . . .").

²⁰³ *Cannon*, 441 U.S. at 732 (Powell, J., dissenting); *Thompson*, 484 U.S. at 188 (Scalia, J., concurring).

²⁰⁴ See Steinberg & Reece, *supra* note 200, at 82 n.112 ("Justice Scalia's disdain for the implication of private remedies reminds one of Justice Powell's vigorous dissent in *Cannon*.")

²⁰⁵ Justice Scalia's paradigm would find support in the Canadian approach to implied causes of action. See Cross, *supra* note 4, at 156 ("Canadian courts will not imply a cause of action from a federal statute."). This is ironic given Justice Scalia's disapproval of the use of international sources in deciding cases. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 869 n.4 (1988) (Scalia, J., dissenting) (noting that "we must never forget that it is a Constitution for the United States of America that we are expounding"); *Printz*, 521 U.S. at 921 n.11 (noting that "comparative analysis [is] inappropriate to the task of interpreting a Constitution").

²⁰⁶ See Steinberg & Reece, *supra* note 200, at 82.

Supreme Court jurisprudence, it is at least possible to consider that the Court may move towards Justice Scalia's corollary.²⁰⁷ Thus, a thorough understanding of his rationale and view is appropriate specifically as it pertains to the current Court understanding of legislative history and legislative intent.

Justice Scalia has argued that the Court should stop implying causes of action.²⁰⁸ He argues this from the position that common law itself, while valuable when engaged in a common law issue, is inapplicable and potentially violative of democratic principles when engaging in statutory interpretation.²⁰⁹ Part of the reason has been his view that more and more of the rules governing the actions of the United States come from statutes rather than common law.²¹⁰ Because statutory law appears to Justice Scalia to be the wave of the federal law future,²¹¹ engaging in interpretation based on traditional tools of the common law is fraught with the risk of failure and can smack of separation of powers problems.²¹²

Justice Scalia's largest problem with the *Cort* analysis stems from the fact that the approach attempts to give a voice to the intent of the legislature while Justice Scalia prefers instead to examine the text that the legislature passed and discern its meaning from ordinary usage of those words passed into law.²¹³ He rationalizes this approach:

"it is simply incompatible with democratic government, or indeed, even with fair government, to have what the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. That seems to me one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read Men may intend what they will; but it is only the laws that they enact which bind us."²¹⁴

²⁰⁷ But see *Merrill Lynch*, 456 U.S. at 375-76 ("Because the *Rigsby* approach prevailed throughout most of our history, there is no merit to the argument advanced by petitioners that the judicial recognition of an implied private remedy violates the separation-of-powers doctrine.") (internal footnotes omitted).

²⁰⁸ *Thompson*, 484 U.S. at 192 ("If a change is to be made, we should get out of the business of implied private rights of action altogether.").

²⁰⁹ See Antonin Scalia, *Federal Courts and the Law*, in *A MATTER OF INTERPRETATION*, 9-14 (Amy Gutmann ed., Princeton University Press 1997).

²¹⁰ *Id.* at 13.

²¹¹ *Id.* (noting that "[e]very issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution" but that "a very small proportion of judges' work is constitutional interpretation in any event. (Even in the Supreme Court, I would estimate that well less than a fifth of the issues we confront are constitutional issues—and probably less than a twentieth if you exclude criminal-law cases).").

²¹² See *id.* at 14.

²¹³ *Id.* at 16-17.

²¹⁴ *Id.* at 17.

Scalia may be correct that inferring legislative intent into a statute runs the risk of leaving the ordinary citizen unsure as to the meaning of the law. It follows that he is also correct that legislative intent runs the additional risk of having the judge inadvertently interpret such intent in a way that appears to make him act as a mini-legislature.²¹⁵ This is because the judge, forced to make assumptions about legislative intent, runs an all too great risk of placing her personal beliefs and values into the statute.²¹⁶

This theory of the how to construe intent does not preclude what Scalia labels “*lapsus linguae*” or a “slip of the tongue,”²¹⁷ when some congressional intent would be examined where a literal reading in extreme cases would lead to absurd results.²¹⁸ This does not give the judge the power to interpret the statute simply in the light that is most reasonable since interpretation for the most reasonable intent returns to the problem of the judge replacing congressional intent with his own.²¹⁹ This textualist understanding, Justice Scalia argues, should not be confused with strict constructionism since textualism does not attempt to interpret a text “strictly” or “leniently” but instead reasonably.²²⁰ While he does note that critics view the approach as formalistic, he is happy to accept that criticism and instead appears to view that as a virtue.²²¹

Justice Scalia turns this understanding of interpretation towards implication cases in much the same manner.²²² He argues, “legislative history should not be used as an authoritative indication of a statute’s meaning.”²²³ This is because implication cases present a “distinctive difficulty because [they] involve[] one of those so-called ‘implied’ causes of action that, for several decades, this Court was prone to discover in—or, more accurately, create in reliance upon—federal legislation.”²²⁴ Justice Scalia’s view on legislative history is not without precedent on the Court.²²⁵ Justice Scalia

²¹⁵ *Id.* at 18 (“When you are told to decide not on the basis of what the legislature said, but on the basis of what it *meant*, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean.”).

²¹⁶ Schuetze, *supra* note 92, at 427.

²¹⁷ Scalia, *supra* note 209, at 20.

²¹⁸ *Id.*

²¹⁹ *See id.*

²²⁰ *Id.* at 23. As an example of this distinction, Justice Scalia cites *Smith v. United States*, 508 U.S. 223 (1993), where the Court interpreted “use” of a firearm to include the sale of a gun. *Id.* Justice Scalia argues that such an interpretation, being clearly outside of the scope of the text, could only be found by a strict construction. Scalia, *supra* note 209, at 23.

²²¹ *Id.* at 25.

²²² *Id.* at 29-37.

²²³ *Id.* at 29-30.

²²⁴ *Lampf*, 501 U.S. at 365 (Scalia, J., concurring).

²²⁵ *E.g.*, *United States v. Pub. Util. Communications of California*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring) (“I should concur in this result more readily if the Court could reach it by

argues that interpretation by use of legislative history is merely a new method²²⁶ used by judges and Justices to justify the search for legislative intent.

Part of his concern about legislative history's uses is that, besides concerns about separation of powers,²²⁷ its use does not necessarily clarify the interpretation of the statute.²²⁸ This is because the legislature who finally must pass the law commonly have not engaged in the writing of the actual legislative history.²²⁹ Worse, the actual members of Congress often may not have even read the legislative history.²³⁰ Moreover, there have been some glaring modern examples of this problem since Justice Scalia first voiced this issue²³¹ such as that of the recent appropriation of \$400 billion Pentagon budget in which, upon being asked why he voted "present" rather than in support of the bill, Brian Baird, the United States Representative from Vancouver, Oregon, admitted:

The frustrating thing is that thing will become law before anyone except the few, the handful on the conference committee, have had a chance to read it. We had a two- or three-page handout, and it hit the highlights This was an authorization bill. There's no reason other than politics that that had to be done on Friday But \$400 billion deserves more than three hours' review.²³²

Based on these concerns and similar views as it pertains to separation of powers concerns, legislative history (or at least legislative history as it is understood in a Congressional Report) is simply not enough to either indicate legislative intent or have the same power as that of the passed law and therefore should not be used.²³³ Notably, Justice Scalia has asserted that in one of the only cases in which he was tempted to use legislative history, his result would have differed from those who did use that history.²³⁴

With this understanding of Scalia's view on the uses and failures of legislative intent (and vicariously legislative history used to discern that

analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. That process seems to me not interpretation of a statute but creation of a statute.").

²²⁶ Scalia, *supra* note 209, at 31.

²²⁷ *Sosa*, 124 S. Ct. at 2769-70 (Scalia, J., concurring) ("Although I agree with much in Part IV [of the majority's opinion], I cannot join it because the judicial lawmaking role it invites would commit the Federal Judiciary to a task it is neither authorized nor suited to perform.").

²²⁸ Scalia, *supra* note 209, at 32.

²²⁹ *Id.* at 34.

²³⁰ *Id.* at 32-34 (citing to 128 Cong. Rec. 16918-19, 97th Cong., 2d Sess. (July 19, 1982)).

²³¹ See *Baird Discusses Bills, Seniors*, OREGONIAN, Nov. 11, 2003, at B1-B2.

²³² *Id.*

²³³ Scalia, *supra* note 209, at 35.

²³⁴ *Id.* at 36.

intent), it is little surprise that Scalia has rarely supported implied causes of action.²³⁵ To be sure, he has supported judgments acknowledging implied causes of action in certain cases where the Court already previously interpreted the statute to contain a private remedy.²³⁶ Those situations, however, may be limited to specific situations that created them.²³⁷ In general, his interpretation has been one of the more consistent doctrines on this issue²³⁸ and his view seems to have strengthened in the eyes of the rest of the Court.

In *Thompson*, Justice Scalia's view on the matter broke into the open.²³⁹ Part of the reason for this was the Court's statement of belief that "our focus on congressional intent does not mean that we require evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action."²⁴⁰ In rebutting this assumption, however, Justice Scalia appears to accept the existence (though admittedly rejecting the use) of a middle ground.²⁴¹ Notably, while attempting to dispute the majority's view, Justice Scalia helped to fuel an already raging debate on the validity of the use of context in implication cases.²⁴² Justice Scalia may oppose the use of such a method of interpretation,²⁴³ but other judges and scholars have taken up the cause. In fact, some have gone so far as to suggest that Justice Scalia's own assumptions in this decision lacked foundation.²⁴⁴

²³⁵ See appendix.

²³⁶ E.g., *Lampf*, 501 U.S. at 364-66 (Scalia, J., concurring); *Franklin*, 503 U.S. at 76-78 (Scalia, J., concurring) (acknowledging an implied cause of action in a statute where previous Supreme Court cases have interpreted the same statute); see also David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to his Constitutional Methodology*, 48 EMORY L.J. 1377, 1413 n.188, (1999) (arguing that Justice Scalia has been more supportive than expected towards the use of precedent). But see *N. Star Steel Co. v. Thomas*, 515 U.S. 29 (1995) (Scalia, J., concurring) (accepting an implied cause of action but arguing that "the cause of action at issue here was created not by us, but by Congress").

²³⁷ In fact, *Lampf* dealt with an implied right to recover against others once an implied cause of action has been found against a defendant. *Lampf*, 501 U.S. at 352; see also *Franklin*, 503 U.S. at 78 (Scalia, J., concurring) ("Because of legislation enacted subsequent to *Cannon*, it is too late in the day to address whether a judicially implied exclusion of damages under Title IX would be appropriate.").

²³⁸ See, e.g., *Thompson*, 484 U.S. at 174 (Scalia, J., concurring) (refusing to imply a cause of action based on legislative intent and legislative history); *Jett*, 491 U.S. at 738 (Scalia, J., concurring) (joining the Court "except insofar as it relies upon legislative history").

²³⁹ *Thompson*, 484 U.S. at 188.

²⁴⁰ *Id.* at 178.

²⁴¹ *Id.* at 191 (Scalia, J., concurring) (noting that "the Court's opinion exaggerates the difficulty of establishing an implied right when it surmises that '[the implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a cause of action] . . . that statement rests upon the erroneous premise that one never implies anything except when he forgets to say it expressly') (internal citations omitted).

²⁴² *Id.* at 190.

²⁴³ *Id.*

²⁴⁴ Schuetze, *supra* note 92, at 426 (arguing that "even though Scalia argued that *Cort* was overruled by later cases, he misread those later decisions . . . As such, *Cort* has not been overruled, but has merely been limited").

In *Alexander v. Sandoval*,²⁴⁵ Scalia, writing for the majority, acknowledged that statutory intent to determine if a statute contains an implied cause of action is determinative.²⁴⁶ He then pointed out that “without it, a cause does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.”²⁴⁷ This approach may have received new adherents on the Court.²⁴⁸

1. Other Doctrines Support Scalia’s Approach

Scalia’s views are not out of keeping with other reigning Supreme Court doctrines. As an example, when federalism issues have arisen and a state court attempts to address a potentially federal issue, the Supreme Court has required that the state court express a clear statement to the effect that it has decided the issue based on state law.²⁴⁹ As the Supreme Court pointed out, if the state court “indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.”²⁵⁰ Thus, when a plaintiff asks the Court to examine a decision by a state court that decided the issue under state grounds, the Supreme Court will defer to the state’s interpretation.²⁵¹ Alternatively, if the state court does not so expressly state that it is deciding the case on state grounds, but instead appears to decide the issue based on federal concerns, the Supreme Court can, and arguably must,²⁵² intervene.²⁵³

Admittedly, the analogy between the Court’s plain statement rule and Justice Scalia’s implied causes of action rule have significant differences. For instance, while the former addresses federalism concerns between the state and federal government, implication cases involve primarily separa-

²⁴⁵ *Sandoval*, 532 U.S. 275.

²⁴⁶ *Id.* at 286.

²⁴⁷ *Id.* at 286-87.

²⁴⁸ *Sosa*, 124 S. Ct. at 2762-63 (Souter, J.) (holding that “this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.”).

²⁴⁹ *Michigan v. Long*, 463 U.S. 1032 (1983).

²⁵⁰ *Id.* at 1041.

²⁵¹ It is not always the case that the state and federal grounds are distinct, however. Thomas E. Baker, *The Ambiguous Independent and Adequate State Ground in Criminal Cases: Federalism Along a Mobius Strip*, 19 GA. L. REV. 799, 800 (1985).

²⁵² See generally *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (noting that “no state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it”). But see Baker, *supra* note 251, at 805-07 (“The important distinction to be made is that the doctrine is not constitutionally required, although it has several possible authorizations.”).

²⁵³ In a similar analogy, the Supreme Court has required criminal defendants to clearly and fairly present federal claims of relief in state court before seeking habeas proceedings in federal court so that the state court can be alerted of the federal nature of the claim. *Baldwin v. Reese*, 124 S. Ct. 1347, 1349 (2004).

tion of powers issues.²⁵⁴ Additionally, the former generally stays within the province of the judicial branches; the latter addresses inter-branch concerns. However, while those differences may be significant, nevertheless, Supreme Court doctrines in other areas where Constitutional issues create analogous situations have tended to lead towards similar and analogous tests.²⁵⁵ Hence, it would not be improper to note that Scalia's approach to implied causes of action, *i.e.*, asking for a clear statement from the legislature in the statute itself, would be analogous to other Supreme Court approaches in other areas of constitutional law and therefore not necessarily as radical a departure as some believe. Some have even hinted that the Court has made strides towards this view without even knowing it,²⁵⁶ though it may yet be too early to make that assumption.

2. Pragmatically, The Supreme Court Will Not Go This Far

Justice Scalia's criticisms have merit in the circumstance of implication cases. It is difficult to believe that Congress, having gone through the entire legislative process could pass a statute implying a right of action without a single legislator voicing a position on whether the statute confers that right.²⁵⁷ While Scalia's approach may be sound, the practical matter of counting Supreme Court Justices shows that it does not appear to hold a majority of the Court. While Justice Scalia's view may have attracted some on the Court, the majority appears to remain tethered to the use of legislative history and legislative intent to determine implication cases. While the last dozen cases out of the Supreme Court have shown a shift towards less implication in statutes, the majority has not yet abandoned the theory of

²⁵⁴ Creswell, *supra* note 137, at 1003 (arguing that federalism concerns also exist in implication cases).

²⁵⁵ A notable example of this is in the areas of the state powers in light of the Commerce Clause as compared with the state powers in light of Article IV privileges and immunities. For instance, in *S. Pac. v. Arizona*, 325 U.S. 761 (1945), part of the test for the commerce clause power of the state was whether the burden placed by the state was against out of state citizens and whether the actions of the state had comparative benefits that such a burden was reasonable. In *United Bldg. & Constr. Trades Council of Camden County & Vicinity v. Mayor and Council of the City of Camden*, 465 U.S. 208 (1984), the Court noted that part of the Article IV privileges or immunities includes whether there is a substantial burden placed on out of state citizens and whether the actions of the state would be necessary to solve some evil related to those out of state citizens.

²⁵⁶ Willscher, *supra* note 124, at 265 (noting that "although the rest of the Court has not adopted Justice Scalia's view, many of the Court's recent opinions have refused to find a cause of action without a plain statement from Congress").

²⁵⁷ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 381 (1978) (holding that "there is no express provision for private actions to enforce Title VI and it would be quite incredible if Congress, after so carefully attending to the matter of private actions in other Titles of the Act, intended silently to create a private cause of action to enforce Title VI"); Schuetze, *supra* note 92, at 429 ("It is hard to believe that a law could emerge from the cumbersome legislative process without including such a vital provision as whether the federal courts are available to enforce the law's provisions.").

implication as a whole, or even the use of legislative history towards understanding that intent.²⁵⁸

The majority of the Court may not hold Justice Scalia's view now or in the near future,²⁵⁹ but there do appear to be indications that his concerns are currying favor with at least some other Justices on the Court,²⁶⁰ some lower judges in the federal circuits,²⁶¹ as well as scholars in the legal community.²⁶² Some scholars, however, have naturally disputed Scalia on several of these points. Another expressed concern is that even if one accepts the concerns expressed by Justices Scalia and Powell that use of *Cort*'s other factors, and to some extent, use of legislative intent as the determinative factor leads to judicial policymaking, still, this offers no reason to oppose the enforcement of a statute that creates rights.²⁶³ Even if one were to accept that legislative intent itself should not be the determinative factor, the Powell/Scalia approach to implied causes of action still fails to give a valid argument as to their opposition of all of the *Cort* factors.²⁶⁴

a) *Critiquing Scalia's Assumptions.* Others have pointed out that textualism itself is far from a perfect theory on how to interpret statutes.²⁶⁵ To them, a statute is far from clear in more cases than Justice Scalia believes.²⁶⁶ Justice Scalia's approach additionally refuses to examine legislative history to see what those in Congress believed the text meant²⁶⁷ even though the Scalia textualist appears willing to look at less direct evidence, such as dictionaries, for guidance on the meaning of a statute.²⁶⁸ This ap-

²⁵⁸ See appendix.

²⁵⁹ See *F. Hoffman-La Roche, Ltd. v. Empagran, S.A.*, 124 S. Ct. 2359, 2366 (2004) (Breyer, J.) ("For those who find legislative history useful, the House Report's account should end the matter. Others . . . may reach the same conclusion . . .").

²⁶⁰ See Mank, *supra* note 32, at 825-26 (noting that both Justices Thomas and Kennedy have shown support for a textualist approach but that Kennedy has since moved from a pure textualist model).

²⁶¹ See Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60-61 (1987) (noting that "the words of the statute, and not the intent of the drafters, are the 'law'").

²⁶² Creswell, *supra* note 137, at 1003.

²⁶³ Mazzuchi, *supra* note 33, at 1089.

²⁶⁴ See *id.* at 1090 ("Despite Justice Powell's objections to judicial policymaking, the Court seemed to conclude that if it did not create an implied right of action it would fail to enforce the statute.").

²⁶⁵ See Mank, *supra* note 32, at 826 ("Numerous commentators have criticized the textualist method of statutory interpretation and argued that judges should examine extrinsic sources, such as legislative history, as a means to reconstruct congressional intent or purposes in enacting a statutory provision, especially if the textual terms are ambiguous.") (internal quotations omitted).

²⁶⁶ *Id.* at 827.

²⁶⁷ See Scalia, *supra* note 209, at 32-34.

²⁶⁸ *MCI Telecoms. Corp. v. AT&T*, 512 U.S. 218 (1994). The willingness to use dictionary definitions is not, however, confined to the textualist approach. See *Jones v. R. R. Donnelley & Sons Co.*, 124

proach, to some critics, appears to be just as arbitrary a way to determine meaning as examination of intent.²⁶⁹ A third concern is that textualists must inherently rely on canons of interpretation that tend, at times, to appear to contradict each other.²⁷⁰ Legislative history, while imperfect, at least gives more credence to what Congress intended rather than the choice of judicial canon.

Commentators further argue that there is some indication that Congress itself dislikes this judicial approach to the interpretation of statutes.²⁷¹ They point out that the evidence appears to show that cases decided by a court employing textualist interpretation is more likely to be overturned by Congress through statutory amendment than one made by courts using other means of interpretation.²⁷² Even if this criticism were true, it fails to make a compelling argument against textualism.²⁷³ Congress may prefer and intend for a court to interpret much into a statute (and therefore to use such things as legislative intent). Nevertheless, the fact that Congress adjusted their statutes to overrule what textualist decisions saw as wanting implicitly meant that Congress moved to make their intent expressly known through the new legislation, meeting exactly the concerns made by textualists by clearly stating their intent in the text of the new statute.

The scholarly argument against Justice Scalia's basic premises on interpretation has not changed his mind. Yet, even Justice Scalia would give up on removing previously granted implied causes of action.²⁷⁴ Justice

S. Ct. 1836, 1845 n.15-16 (2004) (Stevens, J.) (citing the American Heritage Dictionary, Black's Law Dictionary, and the Oxford English Dictionary for definitions of statutory language).

²⁶⁹ Mank, *supra* note 32, at 828.

²⁷⁰ Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401 (1950). This theory, however, neglects the fact that significant anti-textualist jurists regularly employ these same tools. *E.g.*, *F. Hoffman-La Roche Ltd.*, 124 S. Ct. at 2366 (Breyer, J.) (relying on a rule of statutory construction to "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws"); *Gen. Dynamics Land Sys. v. Cline*, 124 S. Ct. 1236, 1245 (2004) (Breyer, J.) (holding that while the general canon of statutory construction is that identical words in different parts of the same statute should convey the identical meaning, "the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent") (internal quotations omitted).

²⁷¹ Mank, *supra* note 32, at 828.

²⁷² *Id.*; see also *Musick*, 508 U.S. at 293-94 (noting that Congress overruled the Supreme Court's decision in *Lampf* by taking away the holding's retroactive effect).

²⁷³ See *Thompson*, 484 U.S. at 192 (Scalia, J., concurring) ("I believe, moreover, that Congress would welcome the certainty that [eliminating implied causes of action] would produce. Surely conscientious legislators cannot relish the current situation, in which the existence or nonexistence of a private right of action depends upon which of the opposing legislative forces may have guessed right as to the implications the statute will be found to contain.").

²⁷⁴ See *Sandoval*, 532 U.S. at 279 (accepting that "it is clear from our decisions, from Congress's amendments of Title VI . . . [that] private individuals may sue to enforce Section 601 of Title VI and obtain both injunctive relief and damages"). See generally *Thompson*, 484 U.S. at 192 (Scalia, J., con-

Scalia may be right on his criticisms and concerns. However, as any first year law student learns, being right does not necessarily translate into being followed by a majority. Thus, Justice Scalia's approach must necessarily be placed aside as an idea perhaps ahead of its time, temporarily replaced with other ideas more in line with current Supreme Court approaches.

B. The Contextualist Response

One alternative approach to Justice Scalia's view would be to take a statute that is silent on causes of action and silent on its legislative history and to ask whether Congress passed the statute in an era when the Supreme Court implied causes of action with more frequency. This contextualist approach argues that it is necessary at times to interpret statutes based on legislative silence because most times that the statute is silent, the legislative intent is similarly silent. Additionally, the Court has teasingly suggested this approach on occasion, though it has never relied on it as a sole factor to the chagrin of many scholars.

Contextualism appears to have grown upon Justice Stevens's comment that "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law."²⁷⁵ Justice Stevens' argument thus rests on the premise that Congress, in knowing the state of Supreme Court law in all areas and importantly, in the area of implied causes of action, must have duly intended implication according to Supreme Court law for statutes passed at that time to be implied.²⁷⁶

This argument appears logical in that the Court should hold Congress to a standard no less than that of the average citizen.²⁷⁷ It is, however, nothing more than a constructive assumption.²⁷⁸ It rests on an assumption that Congress acts with one united voice at all times throughout history.²⁷⁹ Indeed, the Supreme Court has said as much, noting that "[w]e shall assume for the sake of argument (though we by no means accept) that Congress

curing) (noting that "if a change is to be made, we should get out of the business of implied private rights of action altogether").

²⁷⁵ *Merrill Lynch*, 456 U.S. at 379 (quoting *Cannon*, 441 U.S. at 696-97).

²⁷⁶ *See id.*

²⁷⁷ *See Boyer*, *supra* note 19, at 757 (noting that "citizens must be presumed to know something about the law if laws are to be applied consistently. Ignorance of the law, of course, is no excuse for a failure to comply with the law, for a member of Congress any more than for an average citizen.").

²⁷⁸ *Id.* at 757 (noting "it is not seriously contended that any person, or any member of Congress, is actually aware of the full extent and detail of the laws to which he is subject"). This assumption also contains another underlying assumption: that Congress, in passing the law, was not mistaken about the law itself. *Brown v. Gen. Serv. Admin.*, 425 U.S. 820, 828 (1976) (holding that "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was").

²⁷⁹ The Supreme Court itself identified the weakness of this assumption. *Johnson v. Trans. Agency*, 480 U.S. 616, 630 n.7 (1987) ("When a court says to the legislature: 'you (or your predecessor) meant X,' it almost invites the legislature to answer: 'We did not.'").

must be presumed to have had . . . [a relatively obscure decision] in mind as the backdrop to all its legislation.”²⁸⁰ The Supreme Court’s use of context has therefore been haphazard at best²⁸¹ and never as the sole rationale.²⁸² In all fairness to the intellectual community, even textualists at times engage in contextual assumptions.²⁸³ Some have gone so far as to point out that even Justice Scalia has engaged in a contextualist approach.²⁸⁴ This wishful thinking does not appear to have resulted in Scalia’s support of contextualism in general.²⁸⁵

1. Distinguishing Among Contextualists

To be fair, the contextualism in *Curran* and the contextualism argued for by scholars appear to be somewhat distinct.²⁸⁶ The *Curran* contextualism, also seen in *Cannon*, involved the judicial interpretation of a statute or a related statute prior to the one at issue in the case.²⁸⁷ The argument for this form of contextualism runs that statutory language, having been previously given certain meaning by the Supreme Court, should be given a similar

²⁸⁰ *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775 (1991); *see also Morse v. Republican Party of Va.*, 517 U.S. 186, 234 n.47 (1996) (holding that even though a more stringent implication approach came into being before the statute was passed, the timing between the decision and the amendment was not far enough for Congress to have been expected to apply it).

²⁸¹ *See Sierra Club*, 451 U.S. at 296 n.7 (noting that while the respondent argued for legislative context in interpreting a statute, “[w]e cannot assume from legislative silence on private rights of action, that Congress anticipated that a general regulatory prohibition . . . would provide an automatic basis for a private remedy in the nature of common-law nuisance”); *see also Merrill Lynch*, 456 U.S. at 378 (“The key to these cases is our understanding of the intent of Congress in 1974 when it comprehensively reexamined and strengthened the federal regulation of futures trading.”).

²⁸² *Stabile*, *supra* note 18, at 892.

²⁸³ *See Mank*, *supra* note 32, at 833 (“Justice Scalia assumes that the ‘whole Congress’s is composed of legislators that both use words based on their most common or ordinary usage, and that these legislators are cognizant of related statutes and judicial decisions.”).

²⁸⁴ Nancy Eisenhauer, Comment, *Implied Causes of Action Under Federal Statutes: the Air Carriers Access Act of 1986*, 59 U. CHI. L. REV. 1183, 1193 (1992) (“Justice Scalia carefully considered the context of the statute’s enactment, and in fact used the current test only after determining that no test existed during the time of the statute’s enactment.”).

²⁸⁵ *Thompson*, 484 U.S. at 189 (Scalia, J., concurring) (stating that “context alone cannot suffice”).

²⁸⁶ *Id.* (Scalia, J., concurring) (noting that context is relevant only in cases where “the judicial interpretation of related legislation prior to the subject statute’s enactment or of the same legislation prior to its reenactment, had been held to create private rights of action”).

²⁸⁷ *See Merrill Lynch*, 456 U.S. at 379; *see also Cannon*, 441 U.S. at 696-97 (noting that “[i]n 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy” in other similar civil rights acts); *Va. Bankshares*, 501 U.S. at 1083 (holding that implication cases where the Court has previously implied causes of action and Congress has not acted in contravention raises the contextual analysis); *Franklin*, 503 U.S. at 71-73 (noting that the question of whether an implied cause of action existed under Title IX of the Education Amendments of 1972 was in part based on the silence of Congress to judicial interpretation of the Civil Rights Remedies Equalization Amendment of 1986); *Thompson*, 484 U.S. at 189-90 (Scalia, J., concurring) (noting “we have held context to be relevant to our determination in only two cases—both of which involved statutory language that, in the judicial interpretation of related legislation prior to the subject statute’s enactment, or of the same legislation prior to its reenactment, had been held to create private rights of action”).

reading when a similar statute or similar language is found in the case at bar.²⁸⁸ To avoid confusion, this Comment will refer to this form of contextualism as “term of art” contextualism.

Scholars appear to take this to include a form of contextualism when Congress passes a statute in light of the Court’s general interpretation of implied causes of action, however.²⁸⁹ Thus, if a court today were to receive a case in 2004 involving a statute passed in 1905 and found it necessary to engage in a contextual analysis, it would look at the state of statutory law as well as judicial interpretation of implied rights of action as it stood in 1905.²⁹⁰ Scholars call this form of contextualism the “acquiescence doctrine.”²⁹¹ In its purest form, it would find intent to create a cause of action through longstanding practice known to Congress.²⁹²

It is unclear if the “acquiescence doctrine” necessarily follows from “term of art” contextualism, though the Court has recently implied in *dicta* that this is a reasonable approach.²⁹³ Additionally, as Justice Douglas pointed out, “an error in interpreting a federal statute may be easily remedied. If this Court has failed to perceive the intention of Congress, or has interpreted a statute in such a manner as to thwart the legislative purpose, Congress may change [the statute].”²⁹⁴ Thus in most cases, the two forms of

²⁸⁸ See *Guardians*, 463 U.S. at 593 n.14 (“Congress, with full awareness of how the agencies were interpreting Title VI, has modeled later statutes on § 601 of Title VI, thus indicating approval of the administrative definition.”).

²⁸⁹ E.g., *Stabile*, *supra* note 18, at 888-89 (noting as an example that ERISA, replacing common law of trusts, would be subject to implication by the context of the common law on trusts).

²⁹⁰ See *Mank*, *supra* note 32, at 843 (pointing out that this form of contextualism addresses the question of what to do when “a 1995 court is deciding whether to imply a private right of action for a statute enacted in 1965”); *Stabile*, *supra* note 18, at 889-90 (noting that “if a 1995 court is deciding whether to imply a cause of action from a statute enacted in 1933, that court must determine congressional intent based on how courts in 1933 viewed implication, and on the 1933 Congress’s understanding of how those courts viewed implication”). This is not unlike the approach demanded by Justice Brennan. *Jett*, 491 U.S. at 742 n.2 (Brennan, J., dissenting) (“It would make no sense, however, to apply a test first enunciated in 1975 to a statute enacted in 1866.”).

²⁹¹ Some would argue that this doctrine’s proper name is “Congressional Ratification Theory.” *Mank*, *supra* note 32, at 861. However, this name has not carried favor on the Court. *Cent. Bank*, 511 U.S. at 186 (Stevens, J., dissenting) (commenting that “our observations on the acquiescence doctrine indicate its limitations as an expression of congressional intent”). Additionally, scholars have accepted the term as “acquiescence doctrine.” See *Kaufman*, *supra* note 4, at 206 (referencing this theory as “. . . the theory of legislative acquiescence . . .”). Finally, ratification is defined as “approval; sanction; confirmation.” WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 1496 (Jean L. McKechnie ed., 2d ed. 1983). Instead, a more correct name would be “congressional acquiescence theory” since Webster’s defines “acquiescence” as “a quiet assent. . . . silent submission.” *Id.* at 18.

²⁹² See *Davant*, *supra* note 50, at 634 (“That agencies for decades have promulgated regulations that purport to confer individual rights on classes of plaintiffs, without interference or objection by either Congress or the courts, is some evidence that agencies are acting in a manner that the Constitution authorizes.”).

²⁹³ See *Thompson*, 484 U.S. at 181 (noting that the context of the act was an issue for the Court to examine).

²⁹⁴ *Swift & Co. v. Wickham*, 382 U.S. 111, 133-34 (1965) (Douglas, J., dissenting); see also *Hilton v. S.C. Pub. Ry. Comm’n*, 502 U.S. 197, 202 (1991) (pointing out that “considerations of *stare decisis*

context would become indistinguishable after the Court has made its determination.²⁹⁵ The Supreme Court's holdings have far from supported use of either form of contextualism as a sole rationale.²⁹⁶ Holdings appear mixed, however, as to whether context has value in the determination of congressional intent.²⁹⁷

Scholars have argued that the Supreme Court should deal with the question of implication by legislative silence by looking at the context of the statute's passage.²⁹⁸ This rationale argues, "congressional silence in the wake of the judicial construction of a statute indicates congressional approval of that judicial construction."²⁹⁹ Some argue that context itself became an additional factor added to the *Cort* analysis,³⁰⁰ although the Court

have special force in the area of statutory interpretation [because] unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done"). *Cf. Monell v. Dep't of Soc. Serv. of N.Y.*, 436 U.S. 658, 695 (1978) (noting that "although we have stated that *stare decisis* has more force in statutory analysis than in constitutional adjudication because, in the former situation, Congress can correct our mistakes through legislation, we have never applied *stare decisis* mechanically to prohibit overruling our earlier decisions determining the meaning of statutes") (internal citations omitted).

²⁹⁵ In fact, the "term of art contextualist" would refuse to reinterpret the statute in a different way unless the statutory language were changed to result in a different reading under then current Supreme Court law while the "historical contextualist" would refuse to reinterpret the statute in a different way unless Congress affirmatively acts to change the statute to reflect that it disagreed with the Court's decision. Under either approach, the contextualist would insist that the next move would belong to Congress to change the statute.

²⁹⁶ *E.g., Sandoval*, 532 U.S. at 287 (noting that *Cort* itself involved interpretation of a statute under a previous understanding and yet that did not prevent the court from interpreting the statute independent of context for intent); *Cent. Bank*, 511 U.S. at 176; *Karahalios v. Nat'l Fed'n of Fed. Employees*, Local 1263, 489 U.S. 527, 535 (1989) (relying in part on the fact that the judiciary had previously played no role in allowing causes of action in this situation and therefore the historical context of the statute did not constitute enough evidence to support a cause of action); *see also* Kaufman, *supra* note 4, at 168-69 (stating that the Supreme Court has not accepted "acquiescence" as a valid basis for creation of an implied right of action).

²⁹⁷ *Compare Musick*, 508 U.S. 286 (relying in part on the "acquiescence doctrine") and *General Dynamic*, 124 S. Ct. at 1244-45 (holding in part that "[t]he very strength of this consensus [of interpretation among the circuit courts] is enough to rule out any serious claim of ambiguity, and congressional silence after years of judicial interpretation supports adherence to the traditional view") with *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) ("It does not follow . . . that Congress's failure to overturn a statutory precedent is reason for this Court to adhere to it. It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation. Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. Congressional inaction cannot amend a duly enacted statute.") (internal citations omitted); *see also* Schuetz, *supra* note 92, at 426 (noting that "while context alone will not suffice, it is not accurate to say that context is immaterial").

²⁹⁸ *E.g., Mank*, *supra* note 32, at 829-44; *Stabile*, *supra* note 18, at 888-93; *Boyer*, *supra* note 19, at 754-58; *Eisenhower*, *supra* note 284, at 1192-207.

²⁹⁹ Kaufman, *supra* note 4, at 206.

³⁰⁰ *See* Boyer, *supra* note 19, at 756 (commenting that *Merrill Lynch* "made a unique contribution to the development of the doctrine of implied rights of action" because "[u]ntil *Merrill Lynch*, the four *Cort* factors were treated as exhaustive. In *Merrill Lynch* . . . Justice Stevens establish[ed] a new method of raising a presumption of congressional intent . . .").

has never held such an interpretation.³⁰¹ Implication arguably works both ways, existing to support an implied cause of action where the legislative intent is silent or existing to deny an implied cause of action where the legislative intent tends otherwise to support the implication.³⁰² Notably, scholars more often invoke context³⁰³ arguing for an implied cause of action in some statute rather than against.

2. Contextualism: A Doubtful Method of Interpretation

Interpretation by context is one of the more dubious ways to discern congressional intent imaginable. As a preliminary matter, it does not comport with an obvious analogy of how the Supreme Court itself interprets its own past holdings.³⁰⁴ In addition, context requires that the Court in 2004 examine a statute passed in 1905 with an understanding of the state of the law in 1905.³⁰⁵ Granting that some presumptions and legal fictions are necessarily required in a search for legislative intent when the congressional history is devoid of such intent,³⁰⁶ this approach still seems far too problematic to be entertained as a legitimate way to interpret a statute. It is irrational to claim that the Supreme Court can easily find Congressional intent

³⁰¹ *Merrill Lynch*, 456 U.S. at 353.

³⁰² *Franklin*, 503 U.S. at 72 (holding that “the same contextual approach used to justify an implied right of action more than amply demonstrates the lack of any legislative intent to abandon the traditional presumption in favor of all available remedies”). Boyer, *supra* note 19, at 756. See generally *Cent. Bank*, 511 U.S. at 180 (holding that since Congress created express rights of action with certain limits, “it would be . . . anomalous to impute to Congress an intention in effect to expand the defendant class for [an implied cause of action] beyond the bounds delineated for comparable express causes of action”).

³⁰³ E.g., Boller, *supra* note 37, at 1326-27 (arguing that the context of the Rehabilitation Act of 1973 lends itself towards an implied cause of action as it is a civil rights statute); Boyer, *supra* note 19, at 758 (arguing that the context of the Brook Amendment of 1981 lends itself towards an implied cause of action); Eisenhower, *supra* note 284, at 1197-98 (arguing that the context of the Air Carriers Access Act of 1986 lends itself towards an implied cause of action); Harner, *supra* note 92, at 930-31 (arguing that the context of the United States Housing Act of 1937 lends itself towards an implied cause of action); Sagers, *supra* note 19, at 1389-90 (arguing that the context of the Real Estate Settlement Procedures Act lends itself towards an implied cause of action).

³⁰⁴ *Sandoval*, 532 U.S. at 285 n.5 (pointing out that while the majority opinion in a previous case did not mention a position of the concurrence, the majority’s “holding is not made coextensive with the concurrence because their opinion does not expressly preclude the concurrence’s approach. The Court would be in an odd predicament if a concurring minority of the Justices could force the majority to address a point they found unnecessary (and did not wish) to address, under compulsion of Justice Stevens’ new principle that silence implies agreement.”) (internal citations omitted).

³⁰⁵ Boyer, *supra* note 19. This, of course, requires an assumption that the Court must examine the intent of Congress at the time of the passage. *Sandoval*, 532 U.S. at 287 (“Not even when interpreting the same Securities Exchange Act of 1934 that was at issue in *Borak* have we applied *Borak*’s method for discerning and defining causes of action.”).

³⁰⁶ Even legislative history filled with Congress’s views on the matter at hand might constitute a legal fiction called “congressional intent.” See notes 210-33 and accompanying text.

using context from as recent as the past 20 years.³⁰⁷ It would be almost laughable to suggest that the Court is capable of properly interpreting the congressional mood of 90 years ago. For too many implied causes of action, the Court may have to do just that.³⁰⁸ This is not to say that implication cases should require the Supreme Court to infer into a statute passed during the Depression the intent of the current sitting Congress. Instead, the Court should be highly wary of the use of contextual evidence altogether in that case because of the inherent risk that the Court, examining legislative intent from the only “context” humans can, from history and from experience, might implicitly transfer the intent of the Congress it knows for the intent of the Congress it does not know.

3. Contextualism as a Creator of Yet More Separation Problems

As an additional note to the question of the validity of context, the use of context itself may expose deep problems concerning separation of powers that may result in a general denial of the validity of the implication doctrine itself. An example of this is *Sandoval*.³⁰⁹ The Supreme Court, deciding whether to lower the standard of proof in an implied cause of action under Title VI of the Civil Rights Act of 1964, considered (though ultimately rejected) the views of the executive branch on the matter.³¹⁰ Hence, in this case it was possible that the Executive Branch in 2001 would be able to interpret the Congressional intent of the Legislative Branch of 1964 and explain that intent to the Judicial Branch of 2001.³¹¹ Regardless of the ability of the Executive to accomplish this feat of historic interpretation, one would be foolish not to ask how much intent would be left of Congress after both concurrent Branches have had their say on the matter. As one scholar pointed out, “[s]uch an interplay between Congress and the Supreme Court

³⁰⁷ See *Thompson*, 484 U.S. at 181 (attempting and ultimately failing to find a cause of action in an eight-year-old statute).

³⁰⁸ See, e.g., *Touche Ross*, 442 U.S. at 547 n.16 (pointing out that “even if the 91st Congress had believed that there was an implied right of action under § 17(a) . . .” of the Securities Exchange Act of 1934, it would not have mattered because the intent in question would be that of Congress in 1934); *Va. Bankshares*, 501 U.S. 1083 (determining the viability of an implied cause of action for the Securities Exchange Act of 1934 by the Court in 1991); see also Skalaban, *supra* note 79, at 1514 (noting that “an especially fertile ground for implication is the Securities Exchange Act of 1934 . . . and the rules promulgated thereunder by the Securities and Exchange Commission . . .”).

³⁰⁹ *Sandoval*, 532 U.S. 275.

³¹⁰ *Id.* at 287-88.

³¹¹ Amicus Brief for United States at 14, *Alexander v. Sandoval*, 532 U.S. 275 (2001). However, the Supreme Court did agree with the position of the Executive in other cases. E.g., *Contu*, 450 U.S. at 780 (agreeing with the Executive on the proper interpretation of the Portal-to-Portal Act); *Merrill Lynch*, 456 U.S. at 387 (agreeing with the Executive on whether a private cause of action existed in the Commodities Exchange Act).

regarding private remedies . . . represents a startling judicial rejection of the constitutionally mandated separation of powers.”³¹²

Finally, use of context to assume that Congress assented to the judicial interpretation of the statute has the added difficulty of assuming congressional intent through congressional inaction. When Congress explicitly creates a cause of action, it also implicitly grants judicial authority to interpret the statute.³¹³ When the judiciary finds an implied cause of action, however, it is difficult to justify an argument that a conscious “delegation” of congressional authority to add and adjust legislatively granted causes of action has occurred.³¹⁴ Rather, the Court, by using this approach to admit an implied cause of action may in fact be unconstitutionally expanding federal judicial power to the detriment of Congress.³¹⁵ Until Congress passes a statute setting forth a cause of action explicitly (or explicitly denying one), the Legislative Branch has not made a deliberative act that can be interpreted as a desire to deal with the matter.³¹⁶

C. A New Approach to the Congressional Intent Test

Finding Justice Scalia’s textualist approach impractical and the contextualist approach overly problematic, the resulting question must be how the Supreme Court should interpret intent and how much intent must exist to positively or negatively establish legislative intent. A fair balance of the competing views would be for the Court to require some positive showing of intent from congressional members before accepting a positive finding under the legislative history factor of *Cort*. The Supreme Court should adopt this standard for three reasons. First, such an approach would satisfy Justice Powell’s concerns about separation of powers. Second, precedent generally supports this method of inferring congressional intent. Finally, several concurrent analogies already exist in Supreme Court doctrine to justify this approach.

1. This Approach Satisfies Concerns of Separation of Powers

The first reason that the Supreme Court should require a positive showing of congressional intent is because the original purpose of focusing so much on the second factor was to give effect to legislative intent. Justice

³¹² Kaufman, *supra* note 4, at 221.

³¹³ Edward A. Fallone, *Section 10(B) and the Vagaries of Federal Common Law: The Merits of Codifying the Private Cause of Action Under a Structuralist Approach*, 1997 U. ILL. L. REV. 71, 108 (1997).

³¹⁴ *Id.*

³¹⁵ Kaufman, *supra* note 4, at 210 (“Even if Congress had acquiesced by its silence to the expansion of federal judicial power beyond that contemplated . . . the federal courts could not constitutionally accept that power.”).

³¹⁶ Fallone, *supra* note 313, at 108.

Powell's concerns about separation of powers would seemingly necessitate actual congressional evidence.³¹⁷ As Justice Powell wrote in *Cannon*, "we should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist."³¹⁸ For Justice Powell's concerns to hold water, his approach must be grounded in the position that it is not enough for compelling evidence from the history to show that Congress intended the cause of action to occur. Instead, the Powell approach logically requires evidence in the history that Congress actually intended the cause of action to exist. The Supreme Court has somewhat followed Justice Powell's approach.³¹⁹

Some form of "congressional speechmaking" or "floor debate" must exist on the issue in the least. Summations made by staff or presumptions made by the Court simply do not meet this burden. This helps to explain the concern that even more practical and less philosophical Justices have had with the Supreme Court's change in direction in *Thompson*.³²⁰

The Supreme Court, by adopting the contextualist view on occasion,³²¹ has moved away from this understanding by placing the presumptions about the expected intent of Congress to be on equal or even greater footing than that of concerns actually articulated by Congress.³²² However, while the Court has wisely never used that rationale as the sole justification for its decision, it has left itself trapped into the position of potentially using this approach in situations where congressional intent clearly brushes the other way. Instead, the Court should stop engaging in this approach and insist that the question of intent to create a cause of action should start with Congress, not judicial interpretation of congressional silence.³²³

³¹⁷ See *Cannon*, 441 U.S. at 749 (Powell, J., dissenting) (commenting that the Court "should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist").

³¹⁸ *Id.*

³¹⁹ See Schuetze, *supra* note 92, at 429 (noting that "the Supreme Court does not wish to engage in judicial legislation"). But see *Franklin*, 503 U.S. at 73-74 (holding that awarding of remedies for implied rights of action did not create separation of powers concerns and that "selective abdication of the [ability of the judiciary to provide a remedy] would harm separation of powers principles in another way, by giving judges the power to render inutile causes of action authorized by Congress through a decision that no remedy is available").

³²⁰ *Thompson*, 484 U.S. at 188 (O'Connor, J., concurring).

³²¹ See notes 275-85 and accompanying text on contextualism.

³²² See notes 231-32 and accompanying text on the actual intent of Congressman Baird.

³²³ See generally Zeigler, *supra* note 18, at 116 (pointing out that "if Congress wants a statute to confer a right, create a cause of action, or provide a remedy, it must say so expressly, fully, and unambiguously. Moreover, the Court recently has made plain that if legislation is vague or incomplete, it is Congress's job to fix it, not the Court's").

2. This Approach Comports with Supreme Court Precedent

An additional rationale for the court to require actual congressional intent before meeting the second factor, and ultimately the entire *Cort* analysis is that general Supreme Court precedent would be supportive of such a move, not opposed. Both recent precedents³²⁴ as well as earlier decisions, show this approach.³²⁵ Scholars have additionally noted that Supreme Court precedent requires that Congress actively intend a cause of action and cannot be indifferent or neutral on the matter.³²⁶ This would be in keeping with the recent Supreme Court tendency to require clear statements from Congress when Congress has the constitutional right to act in any way it sees fit.³²⁷

What is meant here is not that the Court would vicariously overrule all previous causes of action found. A Supreme Court decision requiring that from now on Congress provide the Court with some indication of actual intent on the issue would not overrule previous interpretations. Those interpretations would still be valid under the “acquiescence doctrine” of contextualism.³²⁸ As mentioned above, this is a form of contextualism where the Court assumes that Congress, having observed the Court interpret a statute to mean a certain thing, and having refused to act to adjust the statute, implicitly accepted that interpretation as correct.³²⁹ This theory would still be viable as an explanation of congressional intent because its use would pragmatically retain the essential implied causes of action that litigants have traditionally relied upon.³³⁰

³²⁴ E.g., *Sandoval*, 532 U.S. 275; *Karahalios*, 489 U.S. at 536 (“Had Congress intended the courts to enforce a federal employees union’s duty of fair representation, we would expect to find some evidence of that intent in the statute or its legislative history.”). See *Thompson*, 484 U.S. at 174 n.3 (relying in part on statements made by Senators Durenberger and Wallop). But see *Va. Bankshares*, 501 U.S. at 1104 (noting that congressional silence is a serious obstacle, but it “is not, however, a necessarily insurmountable barrier”).

³²⁵ E.g., *Touche Ross*, 442 U.S. at 569; *Cannon*, 441 U.S. at 688; *Sierra Club*, 451 U.S. at 295-96 (finding no indication of legislative intent, explicit or implicit, and therefore finding no cause of action); see also Kaufman *supra* note 4, at 205-06 (pointing out that “the Court has made it clear that the implication must be based on evidence of congressional intent”); *Merrill Lynch*, 456 U.S. at 377-78 (“The key to the inquiry is the intent of the Legislature.”) (internal quotes omitted); see also *Guardians*, 463 U.S. at 610 (Powell, J., concurring) (finding that Title VI held clear legislative intent).

³²⁶ Stephen Grow, Note, *Implying the Remedy of Corrective Disclosure Under the Williams Act*, 1986 U. ILL. L. REV. 875, 888 (1986) (“Congressional indifference or neutrality regarding an implied cause of action is insufficient to justify continued judicial recognition of private rights of action.”).

³²⁷ William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) (noting that “the Court in the 1980s has tended to create the strongest clear statement rules to confine Congress’s power in areas in which Congress has the constitutional power to do virtually anything”).

³²⁸ Mank, *supra* note 32, at 861.

³²⁹ *Id.*

³³⁰ See *Musick*, 508 U.S. at 292 (“Having implied the underlying liability in the first place, to now disavow any authority to allocate it on the theory that Congress has not addressed the issue would be most unfair to those against whom damages are assessed.”). See generally *Planned Parenthood of*

3. Analogies to the Actual Intent Standard

Four analogies generally support the position that the Supreme Court should imply a cause of action only when the legislative history expressly provides for one.³³¹ The first analogy is sovereign immunity. The second analogous situation is the Court's treatment of Section 1983 cases. The third analogous situation is the Court's use of the doctrine of preemption. The fourth analogous situation involves treaty abrogation by later enacted statutes. While the Court has never expressly required an affirmative showing of congressional intent, analogous Supreme Court doctrines show that this approach would not be out of keeping with Supreme Court jurisprudence.

a) Sovereign Immunity Requires Actual Intent. The first example by analogy to a requirement that Congress itself manifest a clear statement to the effect that it desires a cause of action has been that of statutes which allege to remove sovereign immunity from the states or the federal government.³³² In this situation, the Supreme Court requires a specific mandate from Congress to override³³³ the traditional presumption in favor of sovereign immunity to the states,³³⁴ at least where Congress invokes its traditionally exercised powers such as the Commerce Clause.³³⁵ While the rationales for this approach are somewhat distinct from those of implied causes of action,³³⁶ the overriding goals in both result in strikingly similar ends.³³⁶ It is an entirely unremarkable thing to ask the Supreme Court to insist on express congressional intent through someone from Congress actually voicing

Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (holding that the reliance by the public on the interpretation of the Court is a valid reason to be cautious in the Court's decision on whether to overrule a previous decision).

³³¹ Use of analogy when determining implied causes of action is not rare. *See Lampf*, 501 U.S. at 356 (holding that borrowing of a federal statute of limitations for federal implied causes of action are effective "only 'when a rule from elsewhere in federal law clearly provides a closer analogy than [found elsewhere] . . .'").

³³² *E.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

³³³ *Tenn. v. Lane*, 124 S. Ct. 1978, 1985 (2004) (holding that the threshold question in determining whether Congress has abrogated the State's Eleventh Amendment immunity, is "whether Congress unequivocally expressed its intent to abrogate that immunity . . .").

³³⁴ *Gregory*, 501 U.S. at 464 (noting that "inasmuch as this Court . . . has left primarily to the political process the protection of the States against intrusive exercises of Congress's Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise"); *Lane v. Pena*, 518 U.S. 187, 192 (1996) ("A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text; 'the unequivocal expression of elimination of sovereign immunity that we insist upon is an expression in statutory text.'").

³³⁵ Defenders of the clear statement doctrine for sovereign immunity have traditionally articulated the requirement as a protection of the States' Tenth and Eleventh Amendment powers. *See Willscher*, *supra* note 124, at 268.

³³⁶ *Gregory*, 501 U.S. at 469 (noting that "it is incumbent upon the federal courts to be certain of Congress's intent before finding that federal law overrides this balance").

his concern on the issue. Such a requirement is common in other doctrines involving the interpretation of statutes passed by the Legislative Branch.

b) Denial of Section 1983 Requires Explicit Congressional Action.

The second analogous situation is that of the famous civil rights statute, Section 1983.³³⁷ This statute, which allows for a cause of action for any person who, under color of state action, is deprived of rights granted by the “Constitution and laws,”³³⁸ has been confused at times with the analysis of implied causes of action because of the similar analysis is entitled to a cause of action.³³⁹ It remains clear, however, that sharp distinctions remain between the use of Section 1983 and implied rights of action, such as the fact that Section 1983 is, by statute, limited to federal statutory violations by state actors or those loosely tied to the State³⁴⁰ and therefore less separation of powers concerns abound.³⁴¹

While there may be limitations on the uses of Section 1983, the Supreme Court has seemingly taken the issue of Section 1983 and allowed a cause of action under any federal statute for a violation if that statute granted a class of citizens some right unless Congress expressly or impliedly denied Section 1983 in the violated statute.³⁴² This is different from an implied cause of action where the Court will assume that the statute does not grant a cause of action unless the Court finds Congressional intent to grant that cause of action.³⁴³ Additionally, both approaches examine the federal statute to see if it grants rights.³⁴⁴ It is unclear to what extent more recent cases have limited or adjusted this analysis,³⁴⁵ but it is clear that the analyses are sufficiently similar that it would not be surprising if scholars

³³⁷ 42 U.S.C. § 1983 (1988).

³³⁸ The relevant text of the statute reads:

Every person who, under the color of any statute . . . of any State . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

³³⁹ *Jett*, 491 U.S. at 712-13 (disputing Justice Brennan’s notion that a § 1983 cause of action should be examined through a *Cort* analysis); see also Harner, *supra* note 92, at 937 (noting that “the standards for section 1983 enforcement and the implication of private rights of action are sufficiently similar to have produced substantial scholarly criticism and considerable confusion in the lower federal courts”).

³⁴⁰ *Stabile*, *supra* note 18, at 872 (noting that “the only difference is in who has committed the statutory violation”); see also Harner, *supra* note 92, at 937.

³⁴¹ *Wilder*, 496 U.S. at 509 n.9.

³⁴² *Maine v. Thiboutot*, 448 U.S. 1 (1980).

³⁴³ Harner, *supra* note 92, at 937.

³⁴⁴ *Id.*

³⁴⁵ Boyer, *supra* note 19, at 763 (arguing that two later cases made the 1983 inquiry coextensive with the Court’s implied rights analysis).

and courts occasionally combined the two.³⁴⁶ It is therefore not an unheard of criticism that the Supreme Court itself has occasionally confused this very issue.³⁴⁷ Scholars have pointed out that the wise plaintiff's lawyer, if forced to engage in either an implied cause of action theory or a Section 1983 theory as a primary claim, would do well to argue both.³⁴⁸

Logically, Section 1983 causes of action and implied causes of action are sufficiently analogous; some would say flip sides of the same coin. Hence, it is notable that when a Section 1983 cause of action is contested based on legislative intent, the Supreme Court generally requires that the intent to deny a cause of action to be made clearly and expressly.³⁴⁹ It seems consistent, therefore, that the implication doctrine equally and oppositely requires that Congress clearly state its intent to create a cause of action.³⁵⁰ Implication cases involve a textualist argument that the plain meaning of the statute should be read against the implied cause of action.³⁵¹ In a similar vein, the Supreme Court has taken the position that the term "laws" in section 1983 should be read plainly to include all statutes passed by Congress.³⁵²

c) Preemption also Requires Actual Intent. The third analogous situation to the proposed congressional intent doctrine is the preemption doctrine. Preemption generally requires actual congressional intent in the federal statute for the statute to wholly occupy an area of law traditionally relegated to state law.³⁵³ This is because a statute that preempts state law on the issue leads to a situation where Congress appears to have stricken the state laws on the issue. The result is an individual left with recourse under federal law or no remedy at all. The idea that preemption of state law requires actual congressional intent on the issue is similar to the implication doctrine offered which equally requires actual Congressional intent that

³⁴⁶ Davant, *supra* note 50, at 626 ("Although the *Sandoval* Court's holding is limited to a particular kind of federal right—limited rights of action—its reasoning and language could have broader implications.").

³⁴⁷ As an example, Donald H. Zeigler argues that the Court did just that: "In the guise of deciding whether the statute conferred a right and whether the private remedy the plaintiff sought was foreclosed by a comprehensive remedial scheme, the Court essentially performed a *Cort v. Ash* analysis." Zeigler, *supra* note 18, at 112; *see also* Key, *supra* note 19, at 330-32 (accord).

³⁴⁸ *See id.* at 302.

³⁴⁹ Harner, *supra* note 92, at 938.

³⁵⁰ One could make the argument that the rationale for allowance of causes of action under section 1983 and denial under the theory of implication is a result of the fact that section 1983 cases in the least have a federal statute upon which the ultimate cause of action can claim some justification against issues of separation of powers; however, such claims and criticisms are beyond the scope of this Comment.

³⁵¹ *See* note 273 and accompanying text for arguments based on textualism.

³⁵² Key, *supra* note 19, at 308 (noting that the textualist theory is the most plausible of the alternative theories on the meaning of the term "law").

³⁵³ *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *Aetna Health, Inc. v. Davila*, 124 S. Ct. 2488, 2495-96 (2004).

Congress expected a cause of action to exist under the statute. As the Court noted in *Kerr-McGee*, legislative silence “takes on added significance in light of Congress’s failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment,³⁵⁴ remove all means of judicial recourse for those injured by illegal conduct.”

It should be therefore equally difficult to believe that Congress, without comment, would expect a statute to contain a cause of action without any explanation as to the breadth or depth of that potential litigation. Thus in preemption cases, the Supreme Court insists that Congress itself show a clear statement to the effect that it wishes to engage in questions of federalism by taking some issue away from state control.³⁵⁵ The Court should similarly require actual congressional intent before the Court attempts to engage in questions of separation of powers. The Court should require Congress to expand the judicial power through a showing of clear intent to grant a federal cause of action.

d) Certain Treaties Mandate Actual Congressional Intent to Overturn. The fourth analogous situation to the proposed actual congressional intent standard is that of the requirement of clear evidence that Congress intended to abrogate a treaty with an Indian tribe. Here the Supreme Court requires that “there must be clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.”³⁵⁶ Instead, the Court requires that Congress consider the issue and will not disregard the treaty if the statute abrogates treaty rights in “a backhanded way.”³⁵⁷

The rationale (though not the test) is unique amongst constitutional doctrines.³⁵⁸ Yet it remains clear that the Supreme Court in these cases requires a clear intent from Congress before it will allow the congressionally approved action to occur. This is the same test offered here towards implication cases: the Court will insist on a clear statement from Congress before implying into the statute that a cause of action should exist.

D. The Actual Congressional Intent Requirement in Action

A final question naturally exists. Assuming that implication requires some form of actual legislative intent, the question becomes how much

³⁵⁴ *Silkwood*, 464 U.S. at 251.

³⁵⁵ In *Silkwood*, the issue to be removed from state control was that of nuclear maintenance. *Id.* at 251.

³⁵⁶ *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999).

³⁵⁷ *United States v. Dion*, 476 U.S. 734, 739 (1986).

³⁵⁸ *Id.* (noting that “Indian treaty rights are too fundamental to be easily cast aside”).

actual intent needs to be established before the Court can legitimately find a private remedy. A calibrated answer to this question can exist only if one contemplates the stages or phases of potential legislative intent to determine the cut-off.

1. Traditional Notions of Statutory Construction

The easy case is when the statute itself contains a cause of action.³⁵⁹ The Supreme Court can find intent in such a case by examination of the statutory language.³⁶⁰ When Congress legislates a cause of action into existence,³⁶¹ or specifically legislates that a cause of action shall not exist,³⁶² it works with the Court to maintain easy distinctions of separation of powers.³⁶³

More difficult is when the statute contains an administrative remedy or other causes of action but no private cause of action on point.³⁶⁴ On this, the

³⁵⁹ *Contu*, 450 U.S. at 770 (stating that “. . . on its face, the Act is a minimum wage law . . .”). *Cf. Lampf*, 501 U.S. at 361 (holding that the statute, by specifically refusing to limit individuals bringing an implied cause of action in any way, expressed an intent to allow for broader implied causes of action).

³⁶⁰ *Suter*, 503 U.S. at 358 (holding that “the terms of [the statute] are clear . . .”).

³⁶¹ *E.g.*, Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 907(h) (1927) (“The employer shall, however, have a cause of action against such third party . . .”); 50 USCS § 1810 (1978) (“An aggrieved person . . . who has been subjected to an electronic surveillance . . . violation of section 109 . . . shall have a cause of action against any person who committed such violation . . .”); 50 USCS § 1828 (1978) (“An aggrieved person . . . whose premises, property, information, or material has been subjected to a physical search . . . in violation of section 307 . . . shall have a cause of action against any person who committed such violation . . .”).

³⁶² *E.g.*, 18 U.S.C.S. § 2511 (2)(B) (1968) (“No cause of action shall lie in any court against any provider of wire or electronic communication service . . . for providing information, facilities, or assistance in accordance with the terms of a court order, statutory authorization, or certification under this chapter . . .”); 18 U.S.C.S. § 2703 (e) (1986) (stating that no cause of action shall lie “against a provider disclosing information under this chapter.”); 42 U.S.C.S. § 9604 (j) (1980) (“There shall be no cause of action to compel the President to acquire any interest in real property under this Act.”); *see also Northwest Airlines*, 451 U.S. at 91 (finding that the statutes did not expressly create a right of action). The art of express congressional denial has not been lost. Congress displayed its ability to limit certain implied rights of action even while creating the Homeland Security Act. *See* 6 U.S.C.S. § 236 (f) (2003) (“Nothing in this section shall be construed to create or authorize a private right of action to challenge a decision of a consular officer or other United States official or employee to grant or deny a visa.”).

³⁶³ *See, e.g., Touche Ross*, 442 U.S. at 568 (deciding that “as with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself”); *Cent. Bank*, 511 U.S. at 174 (accord); Kaufman, *supra* note 4, at 189 (arguing “when Congress legislates in favor of a class of private plaintiffs seeking relief . . . the Supreme Court ensures the wall of separation of powers remains ‘high’”).

³⁶⁴ *E.g., Touche Ross*, 442 U.S. at 569-71 (holding that the statute created an administrative remedy in the Securities and Exchange Commission and therefore did not also create a private remedy); *Guardians*, 463 U.S. 582 (holding that the statute creating an administrative remedy to a Title VI Civil Rights violation precluded a private right of action); *Karahalios*, 489 U.S. at 531-32 (holding that the statute, by expressly leaving enforcement to the administrative agency, therefore denied a private cause of action); *Gebser*, 524 U.S. at 288 (stating that the statute’s “express means of enforcement”—i.e., agencies—precluded the notion that a private enforcement action was contemplated; *see also Lampf*, 501 U.S. at 359 (“When, the statute of origin contains comparable express remedial provisions, the inquiry usually should be at an end.”)).

Supreme Court has generally held that inclusion of the alternative remedies necessarily excludes congressional intent to provide a private remedy.³⁶⁵ At least part of the reason for this approach is the maxim: “*expressio unius est exclusio alterius*,”³⁶⁶ although this has not been the explicit rationale.³⁶⁷ Further on this line, however, the Court has noted that if the administrative remedy is insufficient based on agency refusal to enforce the law or agency inability based on insufficient funds to enforce the law, the question of intent can be found if other indications of intent can be found to support implication.³⁶⁸

This line appears to be illogical if the true concern of the Court is whether intent really exists. It would be nonsensical to tie the amount of money allocated in the federal budget to an agency to the determination of whether Congress intended to create a private right of action.³⁶⁹ After all, if the agency is under-funded or simply refuses to engage in enforcement,³⁷⁰ the problem is not with congressional intent on whether private enforcement should occur, but rather with Congress itself for failing either to provide adequate funds for enforcement of required actions or to force the agency to enforce the law nevertheless.

When Congress passes a statute with language previously used as a term of art by the Supreme Court,³⁷¹ congressional intent may appear simply by looking at the statute.³⁷² This is because Congress, by using language

³⁶⁵ *T.I.M.E. v. United States*, 359 U.S. 464 (1959) (noting that the Motor Carrier Act of 1935 granted rate regulation of motor carriers exclusively to the Interstate Commerce Commission as providing a statutory scheme in which courts have no right to adjudicate such an issue). *But see Merrill Lynch*, 456 U.S. at 384-85 (holding that the inclusion of a regulatory remedy did not necessarily exclude judicial remedies since both went to the goal of self-regulation); *see also Doe v. Chao*, 124 S. Ct. 1204, 1212 (2004) (holding that the statutory minimum of \$1,000 in damages found in the Privacy Act of 1974 precluded recovery when physical damages were less than the statutory minimum).

³⁶⁶ “The expression of one or more things of a class implies the exclusion of all not expressed.” *Stow v. Summit County*, 590 N.E.2d 1363, 1364 (Ohio 3d Cir. 1990).

³⁶⁷ *Sagers*, *supra* note 19, at 1391. While not explicitly held, the Supreme Court has, on occasion, all but accepted this rationale. *Karahalios*, 489 U.S. at 533 (holding that “it is also an ‘elemental canon’ of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies”).

³⁶⁸ *See generally Boyer*, *supra* note 19, at 743 (“When a court finds that a remedial scheme is poorly defined and inadequate to address the needs of a plaintiff, contradictory conclusions regarding congressional intent can be drawn from a silence that is at best ambiguous.”).

³⁶⁹ *But see Stabile*, *supra* note 18, at 883 (arguing that agencies generally have lump sum budgets and little congressional direction on which statute to enforce with the most vigor).

³⁷⁰ *Sagers*, *supra* note 19, at 1398 (arguing for an implied cause of action for the Real Estate Settlement Procedures Act in part because the agency to which its enforcement was entrusted, HUD, “apparently has no interest in enforcing section 10”).

³⁷¹ *See supra* note 287 and accompanying text on term of art contextualism.

³⁷² *See, e.g., Thompson*, 484 U.S. 182 (relying in part on context); *Gebser*, 524 U.S. at 286 (holding that “[t]he statute was modeled after Title VI of the Civil Rights Act of 1964” and therefore should be treated the same way). *Cf. Karahalios*, 489 U.S. at 534 (holding that “there exists no equivalent to [the statute] which permits judicial enforcement of [a private cause of action]”).

already given a certain meaning by the Court, arguably was justified to expect that the language would have a similar interpretation.³⁷³

Similar to this logic, a statute that is amended by Congress that provides for more favorable language³⁷⁴ should be perceived as creating the necessary intent to be interpreted under the second *Cort* factor.³⁷⁵ The Supreme Court has not consistently stated whether this would constitute adequate intent.³⁷⁶ This situation constitutes valid indication of intent nonetheless because by amending the statute to be more amenable to implication concerns, Congress implicitly intended that cause of action to exist.³⁷⁷ Such logic would not extend to interpreting a form of congressional intent into a statute where Congress chose not to amend the statute.³⁷⁸

2. Using Actual Intent

If the statute itself is silent and lends no direct inference on intent, how much intent should the Supreme Court require in the history of the legislation?³⁷⁹ As the Supreme Court in *Touche Ross* pointed out, “implying a pri-

³⁷³ Cannon, 441 U.S. at 699 (noting that between 1964 and 1972, federal courts and the Supreme Court consistently found implied causes of action in similar situations as the one at issue).

This is not to be confused with the contextualist view on interpretation as the contextualist approach argues not that the language is given the value of a term of art, but rather that the language, given a certain interpretation, is left untouched by later Congresses. See notes 269-79 and accompanying text on contextualism.

³⁷⁴ For instance, an amendment that adds language providing a class certain rights or providing a congressional purpose to remedy some violation of the statute. A similar result exists when a proposed statute is amended in committee to more directly address legislative intent. *Sosa*, 124 S. Ct. at 2751 (pointing out that an early House Committee draft of a statute that was “. . . then revised, at the suggestion of the Attorney General . . . codified Congress’s unwilling[ness] to subject the United States to liabilities depending upon the laws of a foreign power”) (internal quotations omitted).

³⁷⁵ E.g., *Merrill Lynch*, 353 U.S. at 384 (relying in part on a 1974 congressional amendment designed to strengthen regulation of futures trading). *Daily*, 464 U.S. at 537-38 (relying in part on amendments passed by Congress to a statute while also relying on the rejection of Congress of other amendments to the statute which would allow an investment company to bring an implied cause of action); *Key Tronic Corp. v. United States*, 511 U.S. 809, 816-17 (holding that Congress passed amendments to the statute that “appeared to endorse” the implied cause of action). See generally *Carlson*, 446 U.S. at 19-20 (relying in part on congressional comments accompanying an amendment). *C.f. Contu*, 450 U.S. at 775-76 (noting the legislative history of an amendment to the statute creating an administrative right in lieu of a private right of action).

³⁷⁶ See *Stabile*, *supra* note 18, at 892 (“The Supreme Court has not been consistent in its acceptance of this theory of adoption, or acquiescence, by silence.”).

³⁷⁷ See *Jones*, 124 S. Ct. at 1844 (holding that “Congress routinely creates new rights of action by amending existing statutes, and altering statutory definitions or adding new definitions of terms previously undefined, as a common way of amending statutes”). This is not quite the same as “term of art contextualism,” however, as the improving language still requires an affirmative act by Congress to create the cause of action. Simply put, not just any amendment will do to create the requisite intent.

³⁷⁸ *Cent. Bank*, 511 U.S. at 187 (holding that “[the Court has] stated, however, that failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute”) (internal citations omitted).

³⁷⁹ E.g., *Touche Ross*, 442 U.S. at 571 (finding the legislative history of the statute “entirely silent on the question of whether a private right of action for damages should or should not be available . . .”).

vate right of action on the basis of congressional silence is a hazardous enterprise, at best.”³⁸⁰ This is because “Congress, for reasons of its own, all too frequently elects to remain silent on the private right-of action question.”³⁸¹ As a result, when the Supreme Court begins the questionable process of implying a cause of action in the face of congressional silence, the Court inevitably multiplies the problem by attempting to interpret congressional intent on additional issues such as the appropriate statute of limitations that Congress intended to give that implied action when it is unclear that Congress ever even expected the underlying action to exist in the first place.³⁸² This is exactly the purpose of what this Comment calls the “actual intent” standard. Under this standard, the Court’s examination of intent begins and ends with a question of whether Congress actually considered the issue of whether a cause of action should exist. This is arguably both a more and less stringent standard than the one currently used. The forms of potential legislative intent show how the Court would decide under this new proposed standard.

The first situation is where Congressional debates occurred on the floor of both Houses passing the statute.³⁸³ In this situation, the statute would clearly meet the actual intent standard. Logically, a single Member of each House on the respective congressional floors could raise the issue. This is because that single Member, by raising the issue, arguably made Congress aware of the possibility of implication in that case.³⁸⁴

Less clear is the scenario where the debate occurs on the floor of only one House of Congress. This has been enough in some circumstances.³⁸⁵ While this approach is less direct, the Supreme Court should find Congressional intent in this situation. The statute’s history, having been subjected to debate on this issue in at least one House, means that legislators have con-

³⁸⁰ *Touche Ross*, 442 U.S. at 571. *But see Musick*, 508 U.S. at 295 (“Inquiring about what a given Congress might have done, though not a promising venture as a general proposition, does in this case yield an answer we find convincing.”).

³⁸¹ *Guardians*, 463 U.S. at 608.

³⁸² *Lampf*, 501 U.S. at 359.

³⁸³ *E.g.*, *Touche Ross*, 442 U.S. at 571 n.11 (relying in part on both House and Senate records of floor debates).

³⁸⁴ *But see Gen. Dynamics*, 124 S. Ct. at 1248 (holding that “even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history”) (internal quotations omitted).

It should be noted that the question of whether the Congressional member who brought up the possibility ultimately voted for the statute should be immaterial for similar reasons.

³⁸⁵ *See, e.g.*, *Contu*, 450 U.S. at 774 (relying on a speech by Representative Bacon in examining congressional intent); *Thompson*, 484 U.S. at 182 n.3 (relying in part on statements of Senators Durenberger and Wallop in examining congressional intent); *see also Pennhurst*, 451 U.S. at 20-21 (declining to find enough congressional intent in a statute where “Senator Stafford stated on the Senate floor that . . . [the law was designed to grant a protection of rights because the Senator] . . . spoke merely in terms of ‘assisting’ the States”); *see also id.* at 21 (relying in part on Senators Randolph’s and Javits’s position as to whether the statute created a private cause of action or merely acted as an assistance program).

sidered the issue and an intent has formed on the issue by ultimately passing the law. While some would criticize this approach based on concerns of bi-cameralism,³⁸⁶ what the Court would be doing here is less like a single House veto, and more like a single House addition, without which the statute would arguably not have been passed in at least one House and therefore never passed into law.

A third relatively clear scenario is when congressional members in the committee from which the bill came voice their opinions during committee meetings.³⁸⁷ This refers specifically to speeches, comments, and concerns made by members of Congress while in committee debating and deciding the merits of the proposed legislation.³⁸⁸ This is yet a more difficult case to discern legislative intent from because the entire House of one House is simply not present when the committee raised these concerns. However, under the proposed standard of actual intent, committee members' views should count towards legislative intent for purposes of *Cort*.

The reason for this is twofold. First, because a congressional member brought the issue up it would simply be consistent to count this intent as actual legislative intent.³⁸⁹ Indeed, if the intent of a Congressional member does not count towards actual legislative intent, then the entire enterprise is arguably a misnomer. Second, congressional members generally self-select themselves to sit on various committees. They do so for a variety of reasons, from political gain to expertise on a particular area. It cannot and should not be the position of the Supreme Court, however, to discount the concerns of a Congressman because they chose to sit on a committee on which they may have particularized knowledge of the subject matter. The Court rather should give equal weight to committee members' views because of their insight on how the best and brightest of Congress on the issue believed that the issue should be decided.

Another potential situation would be that of spoken congressional member's thoughts on an unpassed version of the same Act.³⁹⁰ Under this situation, the expressed concerns of the congressional member should count as evidence towards legislative intent, but weighed less heavily than other forms of intent. Legislative intent admittedly exists. The actual statute,

³⁸⁶ See *Chadha*, 462 U.S. 919 (Court overruling a statute premised on a single house veto).

³⁸⁷ E.g., *Merrill Lynch*, 353 U.S. at 383 n.71 (relying in part on Representative Thorn's comments); *Touche Ross*, 442 U.S. at 574 n.15 (relying in part on Senator Fletcher's comments).

³⁸⁸ See *id.* at 571 n.11 (relying in part on the record of the House Committee on Interstate and Foreign Commerce Committee).

³⁸⁹ See generally *Thompson*, 484 U.S. at 518 n.3 (relying on the statements of Senators Durenberger and Wallop in committee).

³⁹⁰ E.g., *Guardians*, 463 U.S. at 600 (relying in part on the unsuccessful attempt to amend Title VI of the Civil Rights Act of 1964 to ease private rights of action); see also *Thompson*, 484 U.S. at 183-85 (noting the congressional debate between two competing legislative proposals and finding that the rejection of one of them led to insight into the congressional intent of the other).

however, can rebut that intent if that statute has changed in some way. Thus, the intent of the Congress may have remained unexpressed overtly by the new statute, yet the Supreme Court may find congressional intent by an examination of Congress's concerns about the previous statute.³⁹¹

Other forms of potential congressional intent would simply not be enough. For example, legislative history offered after passage of the act is simply invalid.³⁹² This is because the act, once passed by Congress and signed by the President, must stand or fall based on the language and intent expressly creating it. If a Congress in the future could create a legislative past, the process of passing statutes would amount to a system where the law means simply what the majority of the present Congress thinks it means.³⁹³ The Supreme Court therefore must give post-act legislative history little, if any, weight in the consideration of the second *Cort* factor.

Similar to this is legislative history in other, similar acts.³⁹⁴ While some critics would argue that under this proposed standard of actual intent, the Supreme Court should give that history similar weight to that of the intent of similar but unpassed statutes, this would be an incorrect method of discerning actual legislative intent. There would be two reasons that this approach would be invalid. First, the legislative history of a passed statute is logically different from that of the history of an unpassed statute in that the history generally must remain close to the passed legislation. It is difficult enough for the legislative history of a passed statute to explain the intent of that statute, let alone the intent of other laws in the federal code. Second, the Supreme Court itself has generally rejected this method of interpretation as being too indecisive.³⁹⁵ The question of whether to carry over the intent behind a similar statute to the statute at issue should be answered in the negative under the idea of "actual legislative intent."

A comparable result should occur when the Supreme Court examines the legislative history of evidence provided in the committee.³⁹⁶ When a

³⁹¹ The question of whether a great mass of such concerns would be enough to overcome some other more weighted form of legislative intent is beyond the scope of this Comment, however, and is too remote to merit much concern.

³⁹² *Contu*, 450 U.S. at 778 (holding that "the views of this later Congress [cannot] be treated as determinative of the question whether the Act's drafters intended to preclude [a private right of action]").

³⁹³ See Scalia, *supra* note 209, at 22 (disputing the notion that "the law means what it ought to mean").

³⁹⁴ See *Chao*, 124 S. Ct. at 1212 (holding that "subsequent legislative history [found in a different statute] will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment").

³⁹⁵ Lambert, *supra* note 92, at 1239.

³⁹⁶ E.g., *Thompson*, 484 U.S. at 182 (examining the testimony of Acting Deputy Attorney General Michel and a letter from Assistant Attorney General Patricia Wald to Representative Peter Rodino in interpreting whether the statute creates an implied cause of action); *Touche Ross*, 442 U.S. at 574 n.15 (examining the testimony of Richard Whitney, President of the New York Stock Exchange, before the Senate Committee on Banking and Currency).

congressional committee decides whether a bill should go before the floor, the committee usually receives testimony³⁹⁷ as well as other forms of evidence by citizens and specialists on the issue. While commendable that Congress examines this extraneous information before making its decision, the Supreme Court should deny this the force of congressional intent. One reason is that evidence taken by committee may conflict and therefore create inconsistency in use of some evidence for purposes of congressional intent.³⁹⁸ Another reason is that under the proposed standard of “actual intent,” this information is simply not the expressed views of Congress or its members on the issue.

On first impression, this may appear similar to that of the presumption made previously that a single member of Congress’s views should count towards legislative intent. Examined more carefully, however, this approach neglects the fact that this situation requires a triple presumption. The first presumption is that the committee receiving the evidence can constitute Congressional intent. The second presumption is that the committee received entirely consistent evidence which was uncontradicted through the hearing. The third presumption must suppose that the committee, upon receiving the evidence, ultimately had that evidence in mind when making their recommendation. While one presumption may ultimately be helpful, multiple presumptions obviously become problematic.

The final potential source of legislative history is that of the narratives of the committee report.³⁹⁹ Under the proposed system of “actual legislative intent,” this source is inherently flawed and should receive no value in discerning the second *Cort* factor. The reason for this is that it is unclear that Congress itself, or even the congressional committee that created the report,

³⁹⁷ *E.g.*, *Merrill Lynch*, 456 U.S. at 383 (relying on the testimony of the Commodities Exchange representatives given to the House Committee on Agriculture in concluding that Congress intended a private right of action to exist); *Thompson*, 484 U.S. at 181-82 (relying heavily on the testimony of Acting Deputy Attorney General Michel). Some cases have gone even further than testimony. *Daily*, 464 U.S. at 537 (relying in part on a report commissioned by the SEC to hold that Congress intended a right of action).

³⁹⁸ *Lane*, 124 S. Ct. at 1991 n.16 (showing a disagreement between the majority and dissent as to whether certain “evidence” taken by the congressional committee on whether to pass the Americans with Disabilities Act was valid evidence regarding state abuses or immaterial evidence addressing non-state actors).

³⁹⁹ *See Contu*, 450 U.S. at 773-74 (relying in part on the House Committee on Education and Labor Report of the statute); *Pennhurst*, 451 U.S. at 20 (relying in part on the House Committee report to find no cause of action); *Jones*, 124 S. Ct. at 1844 (using a House Report to determine “that Congress was keenly aware of the problems associated with the [Court’s approach in determining federal statutes of limitations]”); *F. Hoffman-La Roche, Ltd.*, 124 S. Ct. at 2369 (holding that the legislative history and reports of the Foreign Trade Antitrust Improvements Act “suggest that Congress designed to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act’s scope as applied to foreign commerce”). *See generally Suter*, 503 U.S. at 361 n.15 (finding legislative history found in the Report of the Senate Committee on Finance “relevant” to the inquiry of whether Congress intended a cause of action to exist).

has read or even thought about the contents of the report.⁴⁰⁰ This is because of a related concern, namely that congressional Members never write the committee reports.⁴⁰¹ Instead, congressional staffers or lobbyists traditionally accomplish this task.⁴⁰² Under the proposed system of actual legislative intent, the Supreme Court should deny this non-congressional attempt at creating a legislative history to discern that Congress impliedly intended to create a cause of action.

The result in this situation is admittedly similar to that of Justice Scalia's distaste for committee reports.⁴⁰³ Nevertheless, if the committee report contains strictly the speeches and debates of congressional members and is devoid of narrative, the reports may have some evidentiary weight in determining congressional intent under the proposed standard.

After examining all potential sources of congressional intent that could arguably result in a finding under the second *Cort* factor, it is important to note what should not play a role in that determination, namely the concern for floodgates.⁴⁰⁴ Admittedly, members on the Supreme Court have on occasion considered the issue of floodgates as a concern that merits attention for purposes of implication.⁴⁰⁵ Scholars have voiced concerns as well.⁴⁰⁶ However, the Court should not base its decision on whether a cause of action would result in more litigation for three reasons.

The first reason is that the question of implication is a jurisdictional issue. Implication cases require the court to consider whether the cause of action exists under the statute in which the Court grants subject matter jurisdiction.⁴⁰⁷ Thus, implication cases should not create the kind of floodgate concerns many worry about because whether to imply a cause of action,

⁴⁰⁰ See *supra* notes 228-30 and accompanying text on committee reports.

⁴⁰¹ Scalia, *supra* note 209, at 35.

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ See generally Toby J. Stern, Comment, *Federal Judges and Fearing the "Floodgates of Litigation"*, 6 U. PA. J. CONST. L. 377, 377 (quoting RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 315 (1996): "[t]oday's caseloads make it a question of some moment whether judges legitimately may consider caseload effects when deciding a case").

⁴⁰⁵ *Merrill Lynch*, 456 U.S. at 377 ("The increased complexity of federal legislation and the increased volume of federal litigation strongly supported the desirability of a more careful scrutiny of legislative intent than *Rigsby* had required."); see also *Lampf*, 501 U.S. at 369 (arguing that "judicial economy" argued for a shorter statute of limitations for the implied cause of action); Vaca, *supra* note 143, at 474-75 ("Undoubtedly, an important motivating factor in the Supreme Court's expansion of [a federal arbitration statute] has been the Court's attempt to reduce the case load on an overburdened federal court system.").

⁴⁰⁶ Zeigler, *supra* note 18, at 138-41 (noting that "if federal courts may abstain entirely from hearing actions that Congress has explicitly directed them to hear, surely they may decline for pragmatic reasons to hear lawsuits that Congress has not explicitly authorized") (internal footnotes omitted). But see Stern, *supra* note 403, at 378 (arguing that "in almost all situations, the fear of increased litigation is not a valid judicial argument").

⁴⁰⁷ See *supra* note 4 on jurisdictional issues involving implication cases.

even if it must go to the Supreme Court, ultimately is decided before full litigation and discovery.⁴⁰⁸ The second reason that the Court should not worry about this issue is that this has not been a concern as of yet,⁴⁰⁹ nor does it logically follow that the creation of a host of implied causes of action itself would result in a vast increase in cases brought to the federal courts.⁴¹⁰ As Justice Powell noted in *Cannon*, the Supreme Court, since *Cort* has seemingly implied enough causes of action for most of the major pieces of legislation to have at least one cause of action in federal court.⁴¹¹ This does not even count the implied causes of action made by the Supreme Court since *Cannon*.⁴¹² A third reason for the Court to ignore the question of floodgates is that it would remove attention from the more important

⁴⁰⁸ Some additionally note that implied causes of action are generally brought along with other claims and therefore the dismissal of the implication claim would not appreciably decrease the federal workload. Sagers, *supra* note 19, at 1402-03. This theory, however, seems to conflict with the idea that implication cases are needed in order to ensure that the plaintiff receive some remedy at all.

⁴⁰⁹ Boyer, *supra* note 19, at 747 (explaining "if in fact the Court's design is to limit the amount of litigation imposed on the already overburdened federal courts by enforcing only those remedies explicitly provided for by Congress, the continued profession of *Cort*'s vitality can only encourage protracted lawsuits by plaintiffs destined ultimately to be denied relief").

⁴¹⁰ See Kaufman, *supra* note 4, at 189-90 (pointing out that while an average of 2,358.5 securities and commodities actions were filed over a three year period, only an average of 123.5 were implication cases). This is far more striking when it is considered that over 283,688 cases went before federal district courts in a comparable year. Stern, *supra* note 400, at 386.

⁴¹¹ At the time of *Cannon*, the implication of as many as 15 different federal statutes had already occurred by the courts. Local 714, Amalgamated Transit Union v. Greater Portland Transit Dist., 589 F.2d 1 (1st Cir. 1978) (implying a cause of action in section 13(c) of Urban Mass Transportation Act of 1964); Bratton v. Shiffrin, 585 F.2d 223 (7th Cir. 1978) (implying a cause of action from section 1007(a) of Federal Aviation Act of 1958); Am. Fed'n of Gov't Employees v. Webb, 580 F.2d 496 (D.C. Cir. 1978) (implying a cause of action from Section 203 of National Aeronautics and Space Act of 1958); Riggle v. Cal., 577 F.2d 579 (9th Cir. 1978) (implying a cause of action under the Rivers and Harbors Appropriation Act); Davis v. Southeastern Cmty. Coll., 574 F.2d 1158 (4th Cir. 1978) (implying a cause of action under section 504 of Rehabilitation Act of 1973); Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978) (implying a cause of action under Art. 28(1) of Warsaw Convention); Abrahamson v. Fleschner, 568 F.2d 862 (2d Cir. 1977) (implying a cause of action under Section 206 of Investment Advisors Act of 1940); Ass'n of Data Processing Serv. Orgs. v. Fed. Home Loan Bank Bd., 568 F.2d 478 (6th Cir. 1977) (implying a cause of action under section 11(e) of Fed. Home Loan Bank Act); N.Y. Stock Exch., Inc. v. Bloom, 562 F.2d 736 (D.C. Cir. 1977) (implying a cause of action under Sections 16 and 21 of Glass-Steagall Act); Daniel v. Int'l Bhd. of Teamsters, 561 F.2d 1223 (7th Cir. 1977) (implying a cause of action under Section 17(a) of securities Act of 1933); United Handicapped Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977) (implying a cause of action under section 504 of Rehabilitation Act of 1973); Nedd v. U.S. Mine Workers, 556 F.2d 190 (3d Cir. 1977) (implying a cause of action under section 302 of Labor Management Relations Act, 1947); Kipperman v. Acad. Life Ins. Co., 554 F.2d 377 (9th Cir. 1977) (implying a cause of action under 39 U.S.C. 3009); McDaniel v. Univ. of Chicago & Argonne, 548 F.2d 689 (7th Cir. 1977) (implying a cause of action under section 1 of Davis-Bacon Act); Hughes v. Dempsey-Tegeler & Co., 534 F.2d 156 (9th Cir. 1976) (implying a cause of action under section 6 of Securities Exchange Act of 1934).

Two implication cases during that time involved the federal Court of Appeals finding a cause of action only to be overturned by the Supreme Court: *Touche Ross*, 442 U.S. 560; *Transamerica*, 444 U.S. 11.

⁴¹² See appendix.

concern, namely congressional intent behind the statute.⁴¹³ Instead, an examination of floodgates would remove from the Court the one concern that creates the purpose of the examination of legislative intent, namely that of deference to Congressional choice.⁴¹⁴

IV. CONCLUSION

In conclusion, the implication doctrine has undergone radical change from its common law ancestry. It has moved from towards a factorial approach and soon after to an approach which focuses on congressional intent. Nevertheless, while the rationale for implications has changed over the years, the question of how to interpret has remained elusive and lacking definition.

It is hoped that this Comment has helped both to explain how the Supreme Court has performed in the past and how it might improve on its performance of the role of interpretive partner to Congress in the constitutional order. Other doctrines exist to clarify and adjust the current implication doctrine, however, they remain impractical and provide more constitutional problems than they appear to solve. A new approach that asks for an adoption of an actual intent standard, where the Supreme Court insists upon actual intent from Congress, would be in keeping with other doctrines, current precedent, as well as consistent throughout the many potential forms of congressional intent.

⁴¹³ See *Cent. Bank*, 511 U.S. at 192 (Stevens, J., dissenting) (complaining that the Supreme Court's decision to deny extension of an implied cause of action would result in overruling "hundreds of judicial and administrative proceedings in every Circuit in the federal system . . ."); see also Stern, *supra* note 403, at 395 (arguing that the concern of floodgates ". . . is simply not considered in the Constitution and thus ruling on its basis should not be assumed to effectuate the purpose of the judiciary as delineated in Article III. As such, doing so violates the Constitution's separation of powers").

⁴¹⁴ See *Cannon*, 441 U.S. at 717 (Rehnquist, J., concurring) (pointing out that because it is better for Congress to specify its intentions, "for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch").